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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1925—No. 165.

Steamship "WILLDOMINO", Her Engines, Boilers, Etc.,
Petitioner (Respondent Below),

—against—

CITRO CHEMICAL COMPANY OF AMERICA,
Respondent (Libellant Below).

OCTOBER TERM, 1925—No. 166.

Steamship "WILLDOMINO", Her Engines, Boilers, Etc.,
Petitioner (Respondent Below),

—against—

CHARLES PFIZER & COMPANY, INC.,
Respondent (Libellant Below).

OCTOBER TERM, 1925—No. 167.

CONVOY STEAMSHIP COMPANY, LTD., Owner of the Steamship "Willdomino", Her Engines, Boilers, Etc.,
Petitioner (Libellant Below),

—against—

CHARLES PFIZER & COMPANY, INC.,
Respondent (Respondent Below).

BRIEF FOR RESPONDENTS.

D. ROGER ENGLAR,
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Counsel for Respondents.

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BRIEF FOR RESPONDENTS.

Statement.

The three cases above entitled are here on writs of *certiorari* to the United States Circuit Court of Appeals

for the Third Circuit. The first and second cases were suits by consignees of cargo against the Steamship *Willdomino* for damage to shipments of citrate of lime, in which they were respectively interested. The third case was a suit by the owners of the steamer for freight on one of these shipments. The District Court dismissed the libel for cargo damage and entered a decree in favor of the owners of the vessel in their suit for freight. The Circuit Court of Appeals reversed the decrees in all three cases.

The opinion of the Circuit Court of Appeals is reported under the title *The Willdomino*, in 300 Fed. Rep. 5 (see also, R. 1425-1440).

The opinion of the District Court is not officially reported but is set forth in the record (R. 1360-1376).

Statement of the Facts.

The facts of the case are fully stated in the opinion of the Circuit Court of Appeals. The statement of facts in the petitioner's brief is incomplete, and for this reason as well as by reason of the petitioner's complete change of position in this Court, it seems necessary for the respondents to state the facts briefly before taking up the questions of law involved. We assume that the writ of certiorari was granted for the purpose of reviewing certain questions of law presented in the petition; but the petitioner's brief attacks, in a number of particulars, the facts found by the Circuit Court of Appeals. The petitioner has so interwoven these questions of fact with the questions of law involved as to make it very difficult, if not impossible, to separate the two for purposes of argument.

The *Willdomino* is a British steamship, 427 feet in

length, 54 feet beam, 27.5 feet depth of hold, gross registered tonnage 5,757.8; net registered tonnage 4,173.4; her deadweight capacity was 8,800 tons (R. 403, 404, 772)*. Her propelling machinery consisted of a turbine engine made up of a high pressure and low pressure ahead turbine and a high pressure and low pressure astern turbine. She was built at Vancouver, B. C., in 1919.

In June, 1920, 503 casks of citrate of lime were laden on the Steamship *Willdomino* at Messina, Italy, consigned to The Citro Chemical Company of America and Charles Pfizer & Company, Inc. The Citro Chemical Company was owner and consignee of 168 casks and the Pfizer Company was the owner and consignee of 335 casks. All of these casks were stowed in lower No. 1 hold. Although the bill of lading in each case was dated June 10, 1920, and the ship sailed from Messina for New York on June 11, 1920, the citrate of lime was not tendered to the libellants in New York until October 2, 1920, when it was in such a damaged condition as to be practically worthless. The libellants refused the cargo when it was thus tendered, and abandoned it to the ship; and the 503 casks were sold by the owners of the steamship for $3,000.00, which was less than the freight on the shipments.

The bills of lading contained printed clauses giving the vessel very wide liberty to deviate, but those clauses were modified by a written clause reading as follows:

> "Filling up only in ports on the way Westwards of New York" (Claimant's Exhibits A and B, R. 916, 917).

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*The transcript of Record in these cases, comprises two volumes. Volume I (pp. 1 to 872, fols. 1 to 2616) contains all pleadings and testimony. Volume II (pp. 873 to 1461, fols. 2617 to 4266) contains all Exhibits, Opinions, Decrees and Appeal Papers.

It is undisputed, and the District Court found, that the word "of", in this clause, should read "to" (see remarks of Claimant's counsel (R. 826), testimony of Gurge (R. 840, 841), Opinion (R. 1378).

The *Willdomino* sailed from Messina for Gibraltar on June 11th, and arrived there on June 16th. At Gibraltar the *Willdomino* received on board 400 tons of bunker coal (Donaldson, R. 446). This amount of coal added to what remained in her bunkers made a total of 756 tons of bunker coal on board when she sailed from Gibraltar on June 17th. (Engineer's log, Claimant's Exhibit S, R. 1195). It is not disputed that Gibraltar is a proper and customary coaling port for vessels bound from Mediterranean ports to New York. From Gibraltar, however, the vessel proceeded northward and eastward to Lisbon, to take on board additional cargo. She arrived at Lisbon on June 18th. In this port the second, third and fifth engineers were signed off on account of illness and two Portuguese engineers were signed on. The vessel left Lisbon on June 24th. Shortly after leaving Lisbon, trouble developed with the oil pumps which were an essential part of her turbine engine. On the first occasion the pumps were repaired before any damage to the engine developed. On the second occasion the trouble with the pumps was not detected in time, with the result that the high pressure turbine was completely disabled by lack of lubrication. The high pressure ahead turbine was then blanked off and the vessel proceeded to Ponta Delgada in the Azores, where she arrived on July 3rd. Certain temporary repairs were effected at Ponta Delgada, but it was impossible there to repair the high pressure turbine, so it was decided to complete the voyage by the use of the low pressure tur-

bine alone. Some 250 tons of coal were taken aboard at Ponta Delgada, and the vessel left there on July 10th with a total of 629 tons in her bunkers.

The Circuit Court of Appeals found that the vessel left both Lisbon and Ponta Delgada with a supply of coal which was inadequate for her voyage to New York.

The question what the *Willdomino's* voyage was intended to be after leaving Ponta Delgada, has been the subject of more discussion and argument than any other question in the case. In both of the lower courts the petitioner argued that the *Willdomino* left Ponta Delgada with the intention of proceeding direct to New York. In this Court the petitioner reverses its position and argues that it was intended at all times that the *Willdomino* should proceed from Ponta Delgada to North Sydney, Cape Breton. Indeed, one of the principal errors assigned in this Court is that the Circuit Court of Appeals decided, in accordance with petitioner's argument in that Court, that the *Willdomino*, on leaving Ponta Delgada, sailed for New York. Passing for the moment this vital point, which will be fully discussed later, the fact is, as established by the uncontradicted evidence of the master and chief engineer of the steamer, that she left Ponta Delgada on the course for New York but, after a few days, changed her course for North Sydney. While still about a day out from North Sydney, the vessel received a wireless message from her owners to go to Halifax instead of North Sydney (Beeby, R. 348, 353). At this time, however, the vessel had not coal enough on board to reach Halifax, so she put into North Sydney, where she arrived on July 22nd with only 62 tons of coal on board (Beeby, R. 318). On account of labor troubles, it was only possible to obtain 62 tons additional (Beeby, R. 318) so that the

vessel, after using 15 tons in the harbor, left North Sydney with only 108 tons, 10 cwt. aboard (R. 1253). The vessel sailed from Sydney shortly after 1 o'clock on July 23rd, bound for Halifax. During the evening of that day, a dense fog set in, which continued throughout the night. Soundings were taken only once during the night, at 4:30 A. M., at which time they showed 91 fathoms of water. At 6:30 A. M., while the vessel was still in a dense fog, she struck bottom about seven miles off Gannet Rock, on a well-known and charted reef (Beeby, R. 291, 319). The vessel was backed off the reef by means of her own engines but she was so far down by the head that she could not be steered. She subsequently reached Halifax on July 27th, with the assistance of a salvage tug which was summoned by wireless, and which first convoyed her and later towed her, when the *Willdomino's* coal supply was nearing exhaustion. At all times after the stranding, the vessel's forepeak and most of No. 1 hold were full of water.

At Halifax the vessel was examined by various surveyors, and the bottom of the vessel was inspected by a diver. Thereafter, the bulkhead between the No. 1 hold and No. 2 hold was strengthened, 400 tons of ballast were put on the stern, for the purpose of raising the vessel's bow, and she was towed to New York, where she arrived on August 7th.

Although the *Willdomino* arrived in New York on August 7th, the petitioner did not tender delivery of libellants' cargo until October 2, 1920, nearly two months after her arrival in port, at which time the cargo was practically worthless.

Citrate of lime is citric acid made by or under the

direct supervision of the Italian Government, and shipped in lime as a carrier, in heavy wooden casks. Each cask was worth about $500, making the total value of the two shipments about $250,000.

The Issues.

Certain of the issues which were contested below are not raised on this appeal.

The petitioner concedes that the stranding of the *Willdomino* was due to negligent navigation (Petitioner's Brief, p. 12).

The petitioner does not allege any error in the decision of the Circuit Court of Appeals that the cargo was not delivered in specie and, therefore, no freight was due (see "Specifications of Error Intended to be Urged", Petitioner's Brief, pp. 9 and 10).

Accordingly, the issues presented in this Court are as follows:

I. Whether the petitioner complied with the conditions laid down in the 3rd Section of the Harter Act (Act of February 13th, 1893); and if not, whether the petitioner is, nevertheless, entitled to the protection of that Section. Respondents contend that the unseaworthiness of the vessel did in fact contribute to the stranding; but they contend further that this fact is immaterial because the condition laid down at the beginning of Section 3 is an absolute condition and is not dependent on any causal connection between lack of due diligence and subsequent loss.

II. On what voyage the *Willdomino* left Ponta Del-

gada and whether this voyage constituted a deviation from the voyage contracted for.

III. Whether the petitioner took reasonable care of the damaged merchandise after the stranding.

POINT I.

The Circuit Court of Appeals found that it was the deliberate purpose of the petitioner not to take on board sufficient coal to carry the vessel to New York, but only barely enough to carry her to North Sydney; and to conceal this intent and put into North Sydney as a port of refuge, under a necessity created by the petitioner itself. The Court found that the vessel was, therefore, unseaworthy, and that this unseaworthiness resulted directly from the owner's cable instructions. These findings are fully sustained by the evidence.

We quote as follows from the opinion of the Circuit Court of Appeals (R. 1438-9):

> "That it was the deliberate and continuing purpose not to take on board enough coal to carry the vessel to New York but only barely enough to carry her to North Sydney is made certain almost to the point of demonstration by the contents of the cablegram sent by the owner to the master at Gibraltar and the three consecutive failures at Gibraltar, at Lisbon and at Ponta Delgada to take on board an adequate and proper amount of fuel for a voyage to New York. Those facts permit no inference other than that it was the intention of the claimant and of the master to have the vessel put in at Sydney. That it was their purpose

> to conceal this intent and to put in to Sydney as a port of refuge (though under a necessity created by themselves) is shown by the vessel's clearing at Lisbon for New York, the statements of the log books that she was proceeding on a voyage to New York, by the subsequent clearance of the vessel at Ponta Delgada for New York and the entries in the engineer's log book that she was proceeding towards New York, notwithstanding the fact that the vessel did not take on board at Ponta Delgada enough coal to reach New York even had the vessel made, under propulsion by the low pressure turbine alone, the average rate of speed which she had made during the five days out from Lisbon before the high pressure turbine was blanked off."

The conclusions stated in the above quotation, of course, are not to be reached without careful consideration; but we respectfully submit that no other conclusion is possible on the evidence.

The Petitioner's Change of Position in This Court.

Both the master and chief engineer of the vessel testified that when they cleared from Lisbon and Ponta Delgada, they intended to make New York without stopping at any other port, except in an emergency. Although this testimony was demonstrably false, in view of the amount of fuel taken on at these ports, the petitioner contended in both of the lower courts that the vessel was not intended to stop at North Sydney and did so only in an emergency, which arose during the voyage. The position taken by the petitioner in the Circuit Court of Appeals appears from the opinion of

that Court. We quote as follows from that opinion (R. 1432, 1433 and 1439):

> "That the *terminus a quo* of the voyage in question was Lisbon is obvious. That the *terminus ad quem* was New York cannot be made clearer than by quoting from claimant's brief, page 44, where it is said: 'She cleared for New York and both logs indicate that the voyage was from Lisbon to New York'.
>
> * * * * * * * *
>
> "The claimant asserts that the insufficiency of the fuel to reach New York was due to unanticipated retarded speed brought about by head winds, currents and the slip of the propeller.
>
> * * * * * * * *
>
> "The claimant has met this array of convincing circumstantial facts only with the contention that the estimates of coal made at the several ports were made in good faith to carry the vessel to the port of New York, that the master in taking coal aboard was not at all governed by the directions of the owner embodied in the cablegram, that the vessel changed her course towards Sydney only because it had then become demonstrated that the coal then in her bunkers was insufficient to take her into New York, * * *."

In view of the above quotation by the Circuit Court of Appeals from the petitioner's brief in that Court, we take the liberty of quoting another passage from the same brief (p. 46):

> "The vessel was cleared from Ponta Delgada for New York on July 10th, expecting to go directly to New York but with the idea in mind

> that if they were held up by poor coal or by bad weather or the influence of the current that they could go into Sydney for additional bunkers."

In the District Court the petitioner argued this point so successfully that that Court not only held that the *Willdomino* was intended to proceed directly from Ponta Delgada to New York, but held further that the officers of the vessel took on a supply of coal which was, in their judgment, sufficient for the voyage (R. 1375).

As the Circuit Court of Appeals found, the District Court was clearly in error on this point, in view of the petitioner's own testimony as to the amount of coal taken on at Lisbon and Ponta Delgada.

Having been defeated in its attempt to treat North Sydney as a port of refuge, the petitioner now blandly abandons that theory and insists that it was never intended that the *Willdomino* should attempt to reach New York, but that she was at all times bound for North Sydney as her next port.

The petitioner's complete reversal of position suggests some rather interesting questions:

To what extent may a party charge a court with an error into which it was led by his own argument?

To what extent can the petitioner repudiate the sworn evidence of its master and chief engineer, which it offered and relied upon in the lower courts?

The Coal Supply of the Willdomino.

For a proper consideration of this phase of the case, it is necessary to discuss the evidence in considerable detail.

It is undisputed that a vessel crossing the North

Atlantic should carry from 20% to 25% more fuel than she is expected to use under normal conditions. Libellants' witnesses Gurge and Jeffcott testified to this effect (R. 844, 798, 799) and the witness Williams, President of the petitioner, confirmed their testimony (R. 865). The testimony of the Chief Engineer of the *Willdomino* is to the same effect (R. 478). In view of this testimony, we take it there can be no question that a vessel which sails with less than this margin of safety is unseaworthy. This rule has been repeatedly applied by the courts.

A case precisely in point is *Hurlbut* v. *Turnure*, 76 Fed. Rep. 587. The steamer *Dunedin* sailed from Cienfuegos, Cuba, on October 3, 1891, bound for New York with a cargo of sugar. Ordinarily, this voyage required about 8 days. Her consumption of coal was 12 tons per day, and upon leaving Cienfuegos she had about 115 tons—or a supply for 9½ days. On the second day out, she met head winds and seas and on the 9th and 10th a northeast gale. On the latter part of the voyage, sugar was used as fuel. She was 12 days, in reaching Newport News, still one day's sail from New York.

The bill of lading contained a clause authorizing the vessel to "call at any port or ports for whatever purpose."

This clause was relied upon by the carrier in support of its action to recover the defendant's share of a general average assessment for ship's materials and cargo consumed as fuel, and also for port of refuge expenses in putting into Newport News for additional coal.

On this point, Judge Addison Brown said:

> "I do not think this clause has any material bearing upon the present question. It has been

repeatedly construed and adjudged not to authorize any departure to ports away from the ordinary course of the voyage, or for any purpose disconnected with the voyage. In other words, it is to receive a reasonable construction: a construction not inconsistent with the well settled right of the shipper to have the specified voyage pursued in the usual manner, without unnecessary delays, or the increased risks incident to such delays. It authorizes calls for reasonable cause or for necessity arising upon the voyage. But it is not reasonable, and the clause cannot be deemed intended, to release the ship from the performance of any of her ordinary duties in preparing for the voyage, or to authorize the ship to sail voluntarily from the port of departure with a short supply of coal, and thus deliberately to create a necessity for calling at intermediate ports not mentioned in the bill of lading, and contrary to the customary course of the voyage" (p. 590).

This decision was affirmed by the Circuit Court of Appeals for the Second Circuit, 81 Fed. Rep. 208.

See also *British & Foreign Marine Ins. Co.* v. *Kilgour S. S. Co.*, 184 Fed. Rep. 174, and *The Abbazia*, 127 Fed. Rep. 495.

On June 15th, while the *Willdomino* lay at Gibraltar, the master received the following cable from the petitioner:

"YOUR COAL REQUIREMENTS EXCESSIVE COST OF BUNKERS GIBRALTAR VERY HIGH MAKE ACCURATE MEASUREMENT REMAINING BUNKERS IF NOT

ENOUGH TO MAKE NORTH SYDNEY TAKE ONLY ENOUGH TO REACH THERE CUT DOWN CONSUMPTION IN EVERY WAY IF FUEL RUNS SHORT REACHING COAST CUT OUT ONE BOILER" (Claimant's Exhibit F, R. 1090).

Respondents consider the sending of this cable one of the most important facts in the present case, and believe that its importance cannot be exaggerated. It is a direct invitation—indeed a positive command—to the master to violate the well-settled practice mentioned above. He was left no discretion to take sufficient coal to give him a 20% margin of safety, but was definitely ordered to "take only enough" coal to reach North Sydney, and "if fuel runs short reaching coast cut out one boiler".

Notwithstanding the cable above quoted, the master and chief engineer stoutly maintained in their testimony that they, in fact, sailed for New York, and merely had North Sydney in mind as a port which they might put into in case they ran short of coal.

In this connection we call attention to the testimony of Williams, president of the petitioner (R. 854), as follows:

> "Q. Now, what were the instructions that you had given your masters in regard to coaling of these British vessels? A. We had previously given instructions to our vessels coming out of the Mediterranean that *if necessary*, they put in to North Sydney for bunkers."

Taking this testimony in connection with the testimony of the master and chief engineer, and in connec-

tion also with the fact that the petitioner insisted in both of the lower courts that the testimony of the master and chief engineer was correct, there is no escape from the conclusion that the cable above quoted was intended by the petitioner, as it was understood by the master and chief engineer, to mean that the vessel was to sail for New York with only enough coal to reach North Sydney. In this connection it must be borne in mind that the cable instructs the master to "cut down consumption in every way" and refers to the possibility of fuel running short on reaching the coast. This certainly suggests that the vessel was to go just as far as she could with the coal supply on board.

Respondents concede that the natural inference from the cable above quoted is that the vessel should proceed direct to North Sydney. It must be borne in mind, however, that the master and chief engineer were acting in the light of previous experience with the petitioner, and with reference to previous instructions. In this connection we call attention to the following testimony of the master of the vessel:

> "Q. When you left Ponta Delgada did you have the port of Sydney in mind at all as a place that you might go to? A. Yes.
>
> Q. Why? A. My owners had instructed me at Gibraltar to bunker at North Sydney *if I found it necessary*" (Beeby, R. 361).

In view of the master's testimony, and the course which he actually followed, we submit that the Circuit Court of Appeals was fully justified in its conclusion that the cable sent to the master at Gibraltar actually

meant, in the light of previous instructions, that the vessel was to sail for New York with only sufficient coal to reach North Sydney.

We will now take up in detail the testimony on the issues above discussed. The master testified as follows:

> "Q. Your destination was New York, when did you change that ultimate destination and go to Sydney is what I want to know? A. About July 16th.
>
> Q. Then up to July 16 you had no intention of going to Sydney? A. I always had Sydney in the back of my head in case I was short of coal or anything happened to the ship, any engine defects or anything turning up.
>
> Q. But up to July 16, you might just as well have intended to go to Halifax as Sydney or any other as a port of refuge? A. Not for a port of refuge, for bunkers, Halifax, Sydney, or Lewisburg.
>
> Q. Any other port? A. Any other port for coal.
>
> Q. Who is it that decides the amount of coal to be taken on the voyage? A. The captain and the chief engineer.
>
> Q. In consultation? A. In consultation.
>
> Q. Did you have various consultations with the chief in regard to the voyage in question during the voyage? A. Yes.
>
> Q. At what time did you notify the chief that it was your orders that the vessel head for Sydney instead of New York? A. I don't notify the chief that we are heading for any particular port at all.
>
> Q. Who decides? A. I decide.
>
> Q. Then you don't tell the chief how to pre-

pare to put through this voyage? A. No, we decide, the chief tells me so much coal left, I work out what she is doing per day, come to the conclusion there might be a shortage, so considering for safety sake it was best to head for North Sydney and rebunker.

Q. When you left Ponta Delgada you and the chief had the intention of going to New York, did you not? A. *Make New York if possible*" (Beeby, R. 313, 314).

In considering the foregoing testimony, it must be borne in mind that this vessel had two distinct points of departure for New York, so far as fuel was concerned. She coaled at Gibraltar on the assumption that she would proceed at her normal speed with both turbines in operation. She coaled again at Ponta Delgada, knowing that she would have to make the voyage on the low pressure turbine alone, with greatly reduced speed and considerably increased coal consumption. The master's testimony shows, however, that the instructions which he received from the owners at Gibraltar were still in force when he sailed from Ponta Delgada. When asked why he had the port of Sydney in mind when he left Ponta Delgada, he said "my owners had instructed me at Gibraltar to bunker at North Sydney, if I found it necessary" (R. 361). Accordingly, the supply of coal taken on board both at Gibraltar and at Ponta Delgada must be considered in the light of the owners' instructions. It can be demonstrated mathematically that the steamer sailed from Gibraltar, from Lisbon and from Ponta Delgada with a wholly insufficient supply of coal to enable her to reach New York.

In dealing with the distances involved in this case, we will refer to Reed's Tables of Distances, which is a standard work of reference on the subject. Where the distance appears from testimony in the record, we will refer to this also.

The steamer left Gibraltar on June 17th, with 756 tons of coal (Engineer's Log, Claimant's Exhibit S, R. 1195). The voyage from Gibraltar to New York was to be made via Lisbon, and hence allowance must be made for the coal which would be used while proceeding to Lisbon, and while lying in port there. As nothing unusual is alleged to have occurred on the voyage to Lisbon, or while there, it may be assumed that the coal consumption actually recorded for this period was the same as was and should have been anticipated. The vessel actually left Lisbon on June 24th, with 651 tons of coal (Engineer's Log, R. 1203). The steaming distance from Lisbon to New York is 2905 miles (Jeffcott, R. 793; Reed's Table of Distances, p. 140).

On the vessel's previous voyage from Norfolk to Marseilles, she averaged about 8 knots per hour, and consumed upwards of 42 tons of coal per day. The testimony of libellants' witness, Jeffcott, to this effect was struck out (R. 794), apparently on the ground that, as these facts all appeared in the log books, which were in evidence, it was improper to permit the witness to testify to them (Cf., R. 791, 793). The purpose of the testimony, of course, was merely to save the time of the Court in making elaborate calculations from the records in the log books. Captain Jeffcott's statements, however, can readily be verified from the log books. The distance from Norfolk to Gibraltar is 3305 miles and from Gibraltar to Marseilles 693 miles,

making a total of 3998 miles (Reed's Tables of Distances, pp. 62 and 139; according to the log book, the distance actually traversed was 4020 miles—(R. 930 to 973. It appears from the deck log (Claimant's Exhibit E-2) that the vessel left Norfolk early on the morning of May 6th and anchored at Marseilles on the evening of May 27th—say 21½ days. It follows that the vessel's average speed was 186 miles per day, or 7¾ miles per hour. It appears from the engine room log (Claimant's Exhibit S, R. 1107 to 1277) that the vessel left Norfolk with 1677 tons of coal in her bunkers (R. 1115) and arrived at Marseilles with 766 tons (R. 1159) showing a consumption of 911 tons, or slightly more than 42 tons per day.

It appears from the deck and engine room logs (Claimant's Exhibits E-1 and S) that the voyage from Norfolk to Marseilles was uneventful and was prosecuted in better than average weather. Accordingly, there could be no possible reason for assuming that the vessel would make better speed on her westward voyage than she had made on her way to Marseilles. On the contrary, the Gulf Stream added about one-half knot per hour to her speed going east, and would have a corresponding effect in diminishing her speed coming west (Jeffcott, R. 795, 796). As the effect of the Gulf Stream would be to add one-half knot to the speed on the eastward voyage and retard the speed one-half knot on the westward voyage, it follows that the speed on the westward voyage would normally be about one knot less per hour than on the eastward voyage. We will give the petitioner the benefit of every doubt, however, and will make our calculations on the assumption that the vessel would have a speed of eight knots (instead of less than seven as should have been anticipated). At the rate of

8 knots per hour, the *Willdomino* would make the 2905 miles from Lisbon to New York in 15 days and 3 hours. In this period, at the rate of 42 tons per day, she would consume 635 tons of coal. Adding 20% additional as a margin of safety, in accordance with the custom mentioned above, we have a total of 762 tons, which the vessel should have had on board when she left Lisbon. As already stated, however, she left Lisbon with only 651 tons, which is only 16 tons more than she might be expected to consume if everything went well and she made better speed on the westward voyage, against the Gulf Stream, than she had made going eastward with the Gulf Stream in her favor. As a matter of fact, if we modify the calculations by cutting the steamer's speed down to 7¾ knots, which is the speed she actually made on her eastward voyage, it will be found that the coal to be consumed on the voyage from Lisbon to New York would have been 655 tons, or slightly more than the vessel had on board when she left Lisbon. It is unnecessary, however, to deal with minute fractions in this connection. The point is that the vessel left Lisbon with barely enough coal to reach New York under the most favorable circumstances, and without any margin of safety whatsoever. In the light of the testimony of the master of the ship and the president of the petitioner, we submit that this course was followed in direct obedience to the owner's instructions.

When the vessel left Ponta Delgada, however, her fuel supply was even more inadequate than when she left Lisbon; and the insufficiency of the supply at this time can be demonstrated even more readily and conclusively than in the case of her sailing from Lisbon.

At Ponta Delgada it was definitely decided that the steamer would complete her voyage on the low pressure turbine alone. This course had been followed on a previous voyage when the same chief engineer (Donaldson) was in charge of the machinery, and he was, therefore, in a position to judge accurately as to the speed which the vessel would make under these conditions. He testified as follows:

> "Q. And the function of the LP is to take what additional force there is out of this? A. Yes, the LP turbine will work at 1½ pounds pressure as long as you have good vacuum; we have got 6½ knots. The two voyages previous to that it was exactly the same way, broke down, the HP blanked off, came 4000 miles from St. Nazaire to Sydney, Portland, New York on the LP. When I got here that time these turbine experts came down and said—of course complimented me for getting the ship in, they said, what pressure did you use on the LP, I said 2½; they said too much altogether, 1½ is quite enough. I think then I made an average of 6¾ knots, this time I think my average was 6½, or something like that" (R. 460).

With respect to the additional coal taken on board at Ponta Delgada, the chief engineer testified as follows:

> "Q. How much coal did you take on board? A. 250 tons.
>
> Q. Were you restricted at all in taking your coal at Ponta Delgada, or could you have taken more if you wished to? A. Well, I think we could have got more, of course that is the captain, he goes ashore, I told him what was necessary, we

have a consultation what we think is necessary, then we come to the conclusion what is necessary and he goes ashore and buys it.

Q. Did you have that consultation? A. Yes.

Q. And you agreed on 250? A. Absolutely.

Q. In your opinion was that sufficient to take you to New York? A. Yes.

Q. Even going simply on the LP? A. Yes" (R. 464, 465).

"Q. From anywhere, generally speaking, when the high pressure is cut out you can only go on the low pressure, how many more tons a day is it reasonable to count on burning than when both turbines are running? A. Eight tons a day.

Q. So did you when you left Ponta Delgada, knowing that the low pressure was to be in operation alone, count on burning 50 tons a day, or 51? A. Well, 50 was the average consumption.

Q. Was the average that you did burn, or was the average you thought you would burn? A. Average that we did burn.

Q. And about 50 or 51 tons a day, that is about eight tons more than normally used, is in your opinion what you should have provided for under the circumstances, is that true? A. Yes" (R. 472).

On the same subject the master of the ship testified as follows:

"Q. You mean under ordinary circumstances —had your vessel been working all right? A. Yes; the weather all right, allowing for running on the LP, I took the chief engineer's estimate of the amount of coal she would burn per day running on the LP. On this we ordered 250 tons of coal.

Q. What was his estimate? A. Fifty tons, he thought about 50 tons a day, he hoped it would be less" (R. 317).

Accordingly, we have definite evidence from the petitioner's own witnesses, the master and chief engineer of the ship, that, when leaving Ponta Delgada, with the high pressure turbine blanked off, they expected the steamer to make about 6½ knots per hour, and consume 50 tons of coal per day. With these facts clearly in mind, they left Ponta Delgada with only 629 tons of coal on board (Engineer's log, Claimant's Exhibit S, R. 1229). The distance from Ponta Delgada to New York is 2,290 miles (Reed's Tables of Distances, p. 142—Jeffcott, R. 793). Captain Beeby gave this distance as 2,099 miles, but this was obviously an error, as appears from Libellants' Exhibit 17. On this exhibit, the distance from Fayal to New York is shown as 2,098 miles; but Fayal is nearly 200 miles west of the Island of St. Michael's where the port of Ponta Delgada is situated. Taking the correct distance of 2,290 miles, it is clear that the *Willdomino*, proceeding at a speed of 6½ miles per hour (or 156 miles per day) would require 14 days and 16 hours to make the voyage from Ponta Delgada to New York. As her fuel consumption was expected to be 50 tons per day, it is obvious that the vessel needed at least 732 tons to make the voyage; and in order to provide the usual 20% margin of safety she should have had at least 878 tons on board when leaving Ponta Delgada. On the contrary, as stated above, she had only 629 tons. In view of these facts, the learned District Court was clearly in error in stating (R. 1375) that "coal, in the judgment of the officers in charge, suffi-

cient to take the vessel to New York, was taken aboard at Ponta Delgada". Not only was the coal supply with which the vessel left Ponta Delgada wholly insufficient, but it was so grossly insufficient that it is impossible to believe that the officers of the vessel were not aware of this fact. The petitioner now contends that the officers of the *Willdomino* had no intention of proceeding direct to New York when they left Ponta Delgada; but if this was the case, they deliberately perjured themselves. We have already quoted the testimony of the master on this point. The chief engineer testified to the same effect as follows:

> "Q. You also had in your own mind, the possibility of taking coal at Sydney in the event of head winds or having troubles? A. Yes, I had 629 tons of coal leaving Ponta Delgada.
>
> Q. That was sufficient to take you to New York, was it? A. Sufficient to take us to New York.
>
> Q. Then you proceeded from Ponta Delgada to New York, you used the LP turbines all the way over? A. All the way over, yes.
>
> Q. With the HP blanked off? A. With the HP blanked off.
>
> Q. Did you have any trouble with the turbines or the oil pumps after Ponta Delgada? A. None at all, everything worked beautifully.
>
> Q. Did you make less speed than you anticipated? A. Yes.
>
> Q. Did it take a greater amount of coal than you anticipated? A. Yes, I measured the coal and found we were burning approximately 50 tons a day.
>
> Q. Eventually you had a consultation with

the captain, did you, as to what would be best to be done about proceeding to New York, or putting into North Sydney? A. We were making Sydney because we knew it would be impossible to reach New York with that amount.

Q. When did you make up your mind? A. Four or five days after we left, we were making very little speed, we could see we would have no coal left, then the ship would have to be towed home, a complete loss.

Q. You decided to put into Sydney for safety? A. Decided to put into Sydney" (R. 465, 466).

"Q. Did you hear the captain say he was going to Sydney from Ponta Delgada? A. No, we would have gone to Sydney in case we found out we could not reach New York on account of head winds, or we were not making sufficient speed in the Gulf Stream.

Q. When you figure on how much coal is necessary, do you figure down to one or two tons and buy enough so you can get to destination? A. No, we always take two or three days more than what is absolutely necessary.

Q. Was that the case in this instance? A. Yes.

Q. You figured you had a surplus of two or three days running to New York? A. Running to New York, if we had gone on good speed and everything favorable.

Q. Then the captain gave you the distance from Ponta Delgada to New York, did he? A. Yes.

Q. From that distance you figured out how much coal you would need? A. Yes.

Q. You don't recall what he told you the dis-

tance was? A. I don't recall now, there is a chart here.

Q. You have not those figures? A. No, not with me, it is easy to reckon up if I knew the distance.

Q. You don't know where your memorandum is upon which you made those figures? A. No, just on a scrap of paper, so much coal.

Q. Did your estimate turn out rather close as to the amount of coal, 50 or 51 tons; is that about what you used? A. That is about it, 49 to 50 all the way to Sydney.

Q. So there was no mistake in your estimate, if there was any failure in the supply of coal? A. I can't quite grasp that question.

Q. I mean if the distances that were given to you were correct and you figured on the speed of the ship at 6 knots and a certain distance per day, and then you told the captain how much coal to buy, inasmuch as you did only burn about 49 or 50 tons, you should have been able to reach New York on your estimate? A. Easily.

Q. Do you know why you were not able to? A. We were in the Gulf Stream, that was preventing our speed two or three days, other days heavy weather.

Q. You had quite some bad weather? A. Although the engines are making even 6½ knots, the ship is only going through the water at a speed of 1 knot an hour with head winds.

Q. Did that happen often on this voyage? A. That happened various days.

Q. You had heavy head winds, bad weather? A. Head winds, and we were right in the Gulf Stream, passing through the Gulf Stream where it was against us; it knocks the speed off the ship.

Q. Can you account for the fact that other officers have testified that they had a perfect voyage? A. I can't; nothing to do with me" (R. 478, 479).

"Q. You didn't figure on enough coal to take you to Sydney, you figured on enough to take you to New York? A. To take me to New York.

Q. And you also figured you had sufficient for three days extra? A. Somewhere up there, two to three days.

Q. Do you know what the length of voyage from Ponta Delgada at 6½ knots an hour to New York should be in days? A. I should think it would be about nine days.

Q. You figured you had 12 days' supply of coal? A. Yes" (R. 486).

As a matter of fact, the log books show that the vessel experienced no bad weather on the voyage from Ponta Delgada to Sydney, and this is proved also by the testimony of the deck officers (Deck log, R. 1034 to 1059; Thirkell, R. 367; Brockwell, R. 395).

Furthermore, the estimates of the master and chief engineer as to speed and coal consumption turned out to be absolutely correct (*infra*, p. 30). Accordingly, there was nothing in the conditions encountered after the vessel left Ponta Delgada which affects the case in any way. The chief engineer's suggestion that the Gulf Stream was responsible for the vessel's inability to reach New York merely shows the lengths to which he was forced to go in his efforts to maintain a wholly untenable position. The effect of the Gulf Stream is constant and

well-recognized, and the officers of the *Willdomino* were bound to take it into account in determining the amount of coal required.

Under these circumstances, the fact that the vessel reached Sydney with only 62 tons of coal left on board furnishes the best possible proof that there was not the slightest chance of her reaching New York with the supply which she had on board when she left Ponta Delgada.

In the light of this evidence, it is impossible to escape the conclusion that the master and chief engineer of the steamer testified falsely. Either they had no intention of endeavoring to reach New York, or else they sailed for New York with full knowledge of the fact that they had an insufficient supply of fuel. It is impossible to assume that any competent master or chief engineer could have sailed from Ponta Delgada with 629 tons of coal and expected to reach New York with a speed of 6½ knots per hour and a coal consumption of 50 tons per day. The proposition is simply absurd.

The only question which really requires consideration is whether the steamer really sailed for New York, or whether she actually sailed for Sydney, C. B. In addition to the testimony of the master and the chief engineer there is some other very cogent evidence that the vessel did actually sail from Ponta Delgada for New York. The *Willdomino* left Ponta Delgada on July 10th. Five days later, on July 15th, the engine room log contains the following entry:

> "Opened up Cross bunkers at 10-0 A. M. Coal taken in Azores finished" (R. 1237).

On the following day, July 16th, the engine room log contains the following entries:

> "Informed Captain that it would be better to make direct for Halifax and to get in Gulf Stream as soon as possible" (R. 1239).

Also, the following entry:

> "Course altered at noon" (R. 1239).

This entry evidently refers to the preceding noon, and is confirmed by the entries in the deck log (Claimant's Exhibit E-2, R. 1046). At all times after leaving Ponta Delgada, the vessel followed a course of N.52°W. until noon on July 15th. At that time her course was changed to the northward and thereafter she followed a course of N.45°W. for 24 hours and thereafter followed a course of N.30°W. until 9 A. M. on July 18th, when she took a course of N.45°W., which she followed until 9 o'clock P. M. on July 19th, after which her course was gradually altered to the westward until she reached the vicinity of North Sydney. These contemporaneous entries afford very strong evidence that the course of the vessel was first laid for New York and later changed for North Sydney.

Further evidence to the same effect is afforded by the record of distance traveled, as reported in the deck log (Claimant's Exhibit E-2). Taking the distances traveled as recorded at noon on each day of the voyage from Ponta Delgada to Sydney, it appears that the vessel traveled a total distance of 1,732 miles (R. 1034 to 1059). But the actual steaming distance from St. Michael's to Sydney is only 1,645 (Reed's Tables of Distances, p. 142). Accordingly, it is apparent

that the vessel traveled nearly 100 miles further than would have been necessary if she had proceeded direct from Ponta Delgada to Sydney.

In this connection it should be noted, in passing, that the vessel traveled this distance of 1,735 miles in the period between 7:40 P. M. on July 10th and 10:30 A. M. on July 22nd, a period of 11½ days. This shows a speed of almost exactly 150 miles per day, or 6¼ miles per hour. During the same period (11½ days) the steamer consumed the difference between the 629 tons of coal with which she left Ponta Delgada and the 61 tons with which she arrived at Sydney, *i. e.*, she consumed 568 tons of coal, or an average of slightly over 49 tons per day. It, therefore, appears that the assumptions of the master and chief engineer at Ponta Delgada as to what the vessel's speed and coal consumption would be after leaving Ponta Delgada were precisely fufilled.

The additional distance traveled fits in exactly with the following testimony of the master:

> "Q. If you had been going to leave Ponta Delgada direct for Sydney would you have taken the same course? A. It would have been different.
>
> Q. Would not you have gone north of Fayal, taken a bigger swing? A. Yes, I would have gone through here (indicating).
>
> Q. So you really were started for New York? A. Really were started for New York, I cleared for New York in the first place, with Sydney, Lewisburg or Halifax in view should we be running short of coal.
>
> Q. Why should you have to have those things

in view in case of running short of coal, is that a case of accident or didn't you take enough coal for the voyage? A. I took sufficient coal to carry me to New York.

Q. That is, was that your estimate or the chief engineer's? A. The chief engineer's and mine" (Beeby, R. 316, 317).

The petitioner suggests in its brief that the log entries with respect to the distance traveled are entitled to no weight because of "the possibility of mechanical and human error". The petitioner also refers to the difference of 87 miles between the actual distance from Ponta Delgada to Sydney and the distance shown in the log, as a "trifling and negligible difference". Navigation would indeed be a hazardous occupation if a difference in reckoning of 87 miles were considered "trifling and negligible" in a voyage of less than 1,650 miles. Log entries are checked by solar observations, and, under normal conditions, they are exceedingly accurate. We call attention to the fact (*supra*, pp. 18, 19) that there was a difference of only 22 miles between the actual distance and the distance by log on the steamer's previous trip of over 4,000 miles from Norfolk to Marseilles.

On the point now under discussion, however, we do not rely primarily on the difference between the actual distance and the distance by log from Ponta Delgada to North Sydney. The fact that the vessel did not follow the usual course is established definitely and without contradiction by the testimony of her master; and the log book is cited merely by way of corroboration.

Even if it be conceded, for the purposes of argument under this head, that the *Willdomino* would have been

justified in proceeding direct to North Sydney for bunkers, this is quite a different matter from proceeding for New York with insufficient bunkers and then turning aside to North Sydney when it became clear that she could not reach New York. A vessel which runs short of fuel in mid-ocean is always in a position of danger. This danger may be greater or less, according to the distance of the nearest port of refuge, but there is danger in the very nature of the situation. We submit that there is and can be no authority to justify a vessel in sailing with insufficient bunkers for the port to which she is bound. Orderly and safe navigation requires that the terminus of a voyage be decided upon at the port of departure, and not dictated by necessity in mid-ocean. The latter course, depending as it does upon individual judgment, is necessarily subject to error. Perhaps the most obvious objection to it is that the whole purpose of such a method of navigation, *i. e.* the endeavor to proceed as far as possible with a given supply of coal, is inconsistent with safety.

The dangers involved in the method of navigation followed by the *Willdomino* are well illustrated by her own experience. Her master was not familiar with the coast of Nova Scotia, between North Sydney and Halifax (Beeby, R. 285). In fact he had never been over the course between these ports (Beeby, R. 319). This is a notoriously dangerous coast.

> "Fogs are very prevalent; the currents are very treacherous and the coast is very tortuous and rugged" (McNaught, R. 809, 810).

It can readily be seen that navigating between two Nova Scotian ports is much more dangerous than approaching

either one of them from the regular Trans-Atlantic routes. In the first case, the vessel is skirting the coast; in the other, she is approaching the coast at right angles. In the present case, while the *Willdomino* was still at least one day away from North Sydney, she received a wireless message directing her to proceed to Halifax. If she had had a reasonably sufficient supply of fuel she need never have gotten near the Nova Scotian coast until she arrived at Halifax. Owing to her meager supply of fuel, however, she lacked some 60 tons of sufficient coal to reach Halifax. This made it necessary for her to continue on to North Sydney, where she obtained barely sufficient coal to reach Halifax. The result was that she had to make the disastrous voyage along the coast, not having even sufficient coal to go a safe distance out from the dangerous Nova Scotian shore-line.

In connection with the facts discussed above, we ask the Court to consider what the situation would have been if the vessel had cleared direct for North Sydney with a proper supply of coal. The voyage of 1,645 miles, at 6½ miles per hour would have taken 10½ days. Burning 50 tons of coal per day, the vessel would have consumed 525 tons. Making the usual 20% minimum allowance for emergencies, she should have sailed with 630 tons of coal. As this would have been 105 tons over her actual needs, she would have reached North Sydney with enough spare fuel to carry her to Halifax (she actually left Sydney with 108 tons 10 cwt.; Engineer's log, R. 1253 to 1255). As a matter of fact, however, she would have had considerably more than this, for she received the message diverting her to Halifax the day before she reached North Sydney, and would have saved the coal which she actually consumed going into North Sydney, as well as 15 tons which were consumed in North

Sydney Harbor (R. 1253). Accordingly, the stranding of the vessel is directly attributable to the fact that the *Willdomino* sailed from Ponta Delgada not only with insufficient coal to reach New York, but actually without a proper supply (including the usual 20% allowance for emergencies) to reach the nearest coaling port, North Sydney, C. B.

It will doubtless be argued on behalf of the claimant that Gibraltar and Ponta Delgada were intermediate ports, and that the claimant is not responsible for what occurred there. Two answers may be made to this contention, either of which is sufficient.

In the first place it is well-settled that the owner of a vessel must make her seaworthy for the entire voyage; or, if he treats the voyage as consisting of several stages, then he must make her seaworthy at the beginning of each of such stages.

In *Thin* v. *Richards & Co.* (1892), 2 Q. B. 141, the plaintiffs were time charterers of the Steamship *Westfalia,* under a charter party which contained the following clauses:

> "The ship being tight, staunch, and strong, and every way fitted for the voyage, shall * * * proceed to Oran * * *, and there load from the charterers, or their agents, a part cargo (say 200 to 250 tons) of Broza (having liberty to fill up with ore or other dead weight cargo for owner's benefit) * * * and being so loaded, shall therewith proceed to Garston dock, or so near thereto as she may safely get, and deliver the same agreeably to bills of lading * * *. Any act, neglect, or default whatever of pilot,

> master or crew in the management or navigation of the ship * * * always mutually excepted. The vessel to have liberty to call at any ports in any order * * *." (p. 141.)

The *Westfalia*, after loading plaintiff's cargo at Oran, proceeded to Huelva, and there filled with iron ore. Although the ship took on a further supply of coal at Oran, she did not have sufficient coal aboard, when leaving the latter port, for the voyage to Garston. This was due to an erroneous report on the part of the engineers, who thought she had 80 tons aboard, which was sufficient for the voyage to Garston.

After leaving Huelva, bad weather was encountered, the supply of coal ran short and the ship put back in an endeavor to make a Spanish port. She went ashore, and was lost with her cargo.

Accordingly, the plaintiffs sued for breach of contract by non-delivery of their cargo.

The trial Court held that the voyage was an entire voyage from Oran to Garston, and that, the warranty of seaworthiness at the commencement of that voyage having been broken, the plaintiffs were entitled to recover.

In the Court of Appeal it was further held that, even if the voyage could be treated as one divided into stages, the warranty of seaworthiness, which attaches at the commencement of each stage, had been broken at Huelva. The language of Fry, L. J., on this point is quite interesting (at p. 144):

> "The voyage from Oran to Garston was either an undivided voyage or it was a voyage in stages.

> In the former case it would be necessary that the vessel should be seaworthy at Oran for the whole voyage. In the second case she must be seaworthy at the commencement of each stage, and therefore seaworthy when she left Huelva. In either case, the warranty of seaworthiness has been broken. It is just and right that the plaintiff should be entitled to recover, for the law imposes a warranty of seaworthiness for the entire voyage contemplated by the parties, and the shipowner ought not to be able to escape from this liability by dividing the voyage into stages."

This decision was followed in the *Vortigern*, 1899 Prob. 140, where an action was brought by the owners of the steamship *Vortigern* to recover freight due under a charter party. The defense was that a portion of the defendant's cargo, consisting of copra—a species of cocoanut, had, during the voyage, been burnt by the master as fuel for the ship; and that this burning of the cargo had taken place in consequence of a breach of the implied warranty of seaworthiness which attached to the contract of affreightment at the commencement of the voyage; that is, that coal necessary for the due prosecution of the voyage had not been taken on board when the ship commenced the chartered voyage, and the cargo had, therefore. to be used as fuel in the place of coal.

It appeared that the vessel had left Cebu (Philippine Islands) for Liverpool, with the cargo in question. She called at Colombo, but did not take in a reasonably sufficient quantity of coal for the next stage to Suez, and, when passing Perim (a coaling station), the master did not call there, owing to the negligence of the engineer

in not informing him that the coal was running short. Consequently, whilst proceeding up the Red Sea, 50 tons of cargo were burned as fuel, in order to carry the vessel on to Suez, where she coaled again, and thus was enabled to perform the chartered voyage to Liverpool.

The Court, in deciding in favor of the defendants, held that, if the plaintiff shipowners, owing to the necessity for coaling, availed themselves of the liberty to call at ports on the way, they must make their vessel seaworthy at the commencement of each stage of the voyage she thus entered upon, and, in the circumstances of this case, the second stage was from Colombo to Suez. The plaintiffs, therefore, could not rely on the exception covering negligence of the engineer when off Perim, as by the insufficiency of coal, when the vessel left Colombo, the implied warranty of seaworthiness had been broken.

See also:

Moore v. *Lunn*, 38 T. L. R. 649; affirmed in the Court of Appeal, 39 T. L. R. 526.

A second and even more conclusive answer to the suggestion that Gibraltar and Ponta Delgada were intermediate ports, is the fact that the failure of the vessel to receive sufficient fuel at these ports resulted directly from the claimant's express orders to that effect. It will scarcely be suggested that a shipowner who, by his own deliberate act, renders a vessel unseaworthy at an intermediate port, can claim the benefit of the Harter Act because of the diligence which he may have used at some earlier port. So far as we know, such a suggestion has never been made, and we assume that it will not be made in this case. And yet there can be no doubt

that the unseaworthiness of the *Willdomino*, at all times after leaving Gibraltar, was the direct result of her owner's cable instructions to the master. The master did exactly what the president of the claimant company instructed him to do. When confronted with his cable to the master at Gibraltar, Williams, president of the claimant company, testified as follows:

> "Q. Well, why did you tell him to get only enough coal to take him to Sydney and then if he hadn't quite figured it accurately, to get enough to come in on one boiler only? A. The intention of that was that if he should run into bad weather and as he was approaching the coast began to run short of coal, that he should cut out one boiler, which is practical from an economical engineering standpoint" (R. 857).
>
> "Q. At any rate, you didn't intend to allow your master to buy more than enough coal to get to Sydney and get there on one boiler at that, if necessary? A. That's the way that cable looks to me that we had that in mind at that time" (R. 861).
>
> "Q. When you sent this cable to your master, did you mean that he should follow the directions contained in it, or not? A. Generally speaking, yes.
>
> Q. You would have discharged him, if he hadn't done it, wouldn't you? A. Generally speaking, I may have.
>
> Q. You sent this order to your master to be obeyed, didn't you? A. Generally speaking" (R. 866, 867).

In the face of this cable to Gibraltar, and the testimony above quoted, it is idle for the claimant now to

attempt to evade responsibility for the master's failure to take on board sufficient coal at Gibraltar and Ponta Delgada. Claimant's cable was clear and the master of the vessel obeyed it literally. This Court will note the peremptory tone of the cable in question, which starts off with the words "your coal requirements excessive". This cable could not fail to influence the master contrary to his own judgment. In fact, the following testimony of Williams shows that it was intended for that precise purpose:

> "Q. Now, what was your purpose in sending this telegram, Claimant's Exhibit F, to the master of the vessel? A. I would gather from that that we had had some advices from the master stating he wanted a certain number of tons of coal at Gibraltar, and that I probably advised him to remeasure his bunkers to be certain of his requirements. I probably had in mind the amount of coal——
>
> Mr. Carpenter: I object to that 'probably'—I want the truth.
>
> The Court: Strike out 'probably'.
>
> A. Having in mind the amount of bunkers that he took aboard on sailing for Marseilles, which as I recall it were intended to cover the round trip bunkers; having further in mind that engineers and masters are much inclined to take an excessive amount of bunkers, regardless of cost *as a further safety in their operating of ships*" (R. 855).

In other words, claimant sent this cable with the deliberate purpose of cutting down the margin of safety which the master considered necessary. Certainly, an

owner who assumes to dictate the amount of coal to be taken on board, and who deliberately cuts down the margin of safety in that respect, is equally responsible whether this action is taken at the port where the voyage begins or at a later port.

Petitioner may attempt to argue in this Court that even if it is responsible for the amount of coal taken on at Gibraltar and Ponta Delgada, it is not responsible for the action of the master in sailing for New York instead of North Sydney. We are confident that this Court will not entertain such an argument at this stage of the case. In both of the lower courts, the petitioner adopted the position of the master as its own, and urged that the vessel sailed for New York and that she was fully justified in so doing. Surely it is now too late for the petitioner to repudiate the action of the master and suggest that it was a violation of petitioner's instructions.

POINT II.

Having failed to use due diligence to make the *Willdomino* seaworthy as required by Section 3 of the Harter Act (27 Stat. L. 445), and having on the contrary, directed her to sail in an unseaworthy condition, the petitioner, as owner of the vessel, cannot invoke the protection of that section, but is liable for damage to cargo resulting from the negligence of its servants.

It is conceded in this Court, that the stranding of the *Willdomino* was due to negligent navigation (Petitioner's Brief, p. 12).

Not having supplied the *Willdomino* with sufficient fuel, or used due diligence to that end, it is clear that the petitioner is not protected by the Harter Act; nor is the petitioner protected by any clause in its bill of lading purporting to exempt it from liability for negligent navigation.

The principles of law applicable to the facts of this case are clear and well-settled. A shipowner cannot exempt himself from liability for a negligent stranding, excepting by compliance with the terms of the Harter Act. This principle has frequently been stated by this Court. Thus, in the case of *The Jason*, 225 U. S. 32, this Court said, at page 49:

> "Prior to the Harter Act it was established that a common carrier by sea could not by any agreement in the bill of lading exempt himself from responding to the owner of cargo for damages arising from the negligence of the master or crew of the vessel. *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 438; following *New York Central Railroad Co.* v. *Lockwood*, 17 Wall. 357."

Accordingly, unless the shipowner can show affirmatively that he has used due diligence, as required by the Harter Act, he can have no exemption, either contractual or statutory, in respect of losses due to negligent navigation.

The Harter Act (Act of February 13, 1893), provides as follows (Section 3):

> "That if the owner of any vessel transporting merchandise or property to or from any port in the

> United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers shall become or be held responsible for damages or loss resulting from faults or errors in navigation or in the management of said vessel," etc.

In the case of *International Navigation Company* v. *Farr & Bailey Mfg. Co.*, 181 U. S. 218, this Court said, at page 225:

> "We do not think that a shipowner exercises due diligence within the meaning of the act by merely furnishing proper structure and equipment, for the diligence required is diligence to make the ship *in all respects* seaworthy, and that, in our judgment, means due diligence on the part of all the owners' servants in the use of the equipment before the commencement of the voyage and until it is actually commenced."

We call the Court's attention particularly to the fact that the italics in the foregoing quotation are not our own, but appear in the original opinion.

Later in the same opinion (p. 226) the Court said:

> **"We repeat that even if the loss occur through fault or error in management, the exemption cannot be availed of unless the vessel was seaworthy when she sailed, or due diligence to make her so had been exercised, and it is for the owner to establish the existence of one or the other of these conditions." (Black face type ours.)**

In the later case of *The Wilderoft*, 201 U. S. 378, at pages 388, 389, this Court said:

> "To permit a cargo of sugar to be injured by the introduction of fresh water in the manner shown, but for the provisions of this act, would have made a case of clear liability against the owner, and where the statute has given immunity against such loss by reason of error in navigation or management, it does so upon the distinct condition that the owner shall show that the vessel was in all respects seaworthy and properly manned, equipped and supplied for the voyage; or, if this cannot be established, that he has used due diligence to obtain this end. The discharge of this duty is not left to any presumption in the absence of proof. **It is the condition precedent, compliance with which is required of the vessel owner in order to give him the benefit of the immunity afforded by the act.** * * * It is only when he has discharged the burden which the law imposes upon him, and shown that he has furnished a vessel, fit and seaworthy, or has used due diligence to that end, that the law relieves him of the liability which he would otherwise incur." (Black face type ours.)

The foregoing authorities show clearly that there need be no causal connection between the lack of due diligence and the subsequent negligence.

See also *The Southwark*, 191 U. S. 1, at page 16.

It was suggested in the courts below that the language above quoted was mere dictum, but we submit

that this is not the case. One of the points made on behalf of the carrier in the *Farr & Bailey* case was that the loss was due to negligence of the crew; so that the language quoted was an essential part of the decision. But even if the language quoted were dictum, it has stood unchallenged as a correct statement of the law for twenty-five years. Moreover, in *The Wildcroft, supra,* this Court, although affirming the decision of the Circuit Court of Appeals, deemed it necessary to correct the erroneous interpretation of the Harter Act embodied in the opinion of the lower Court (201 U. S. at p. 388). We submit that a statement of the law made under such circumstances is not to be lightly disregarded.

There is no decision either of this Court or of any of the lower courts which is contrary to the rule laid down in the above quotations.

The petitioner's entire argument on this point, as set forth in Point III of its brief, is based upon a complete misconception of the purpose and effect of the Harter Act and its relation to pre-existing law. In effect, petitioner's argument is that it would be absurd to hold it responsible, on account of the shortage of fuel, for damage which did not result from that cause. This argument is plausible enough on its face, but it is based on a misstatement of the facts. The petitioner was not held liable because its vessel was short of fuel, but because its servants were guilty of negligence in navigation, which directly caused the damage to respondents' cargo. The basis of petitioner's liability is the fundamental principle of all law, that one who negligently damages the property of another is liable for the damage; together with the rule of *respondeat superior,* which extends this liability to include the negligence of his servants. It is

true that Congress has created a statutory modification of this general liability, of which the petitioner might have obtained the benefit by complying with the conditions upon which it is granted. Not having complied with these conditions, the petitioner, of course, cannot obtain the benefits of the statute.

The very structure of the third section of the Harter Act clearly indicates that there is no causal connection contemplated between the condition and the exemption. There will rarely be any connection between unseaworthiness and negligence in navigation; and yet due diligence to make the ship seaworthy is made the condition of exemption in respect of negligent navigation. If the Act were based on causal relation, one would expect that a shipowner who had used due diligence to make his ship seaworthy would be relieved from liability for losses resulting from unseaworthiness. The Act does not say this, however, and is not so construed. In *The Carib Prince*, 170 U. S. 655, at pages 661-2, this Court held that the Harter Act does not protect the shipowner in respect of damage due to unseaworthiness, even though he has used due diligence to make his vessel seaworthy.

The petitioner's misconception of the effect of the Harter Act is well illustrated by its citation of the decision of the Circuit Court of Appeals for the Fourth Circuit in the case of *The Turret Crown* (Petitioner's Brief, p. 42). That decision, as appears from the passage quoted by the petitioner, was based upon the assumption that the damage to the cargo of the *Turret Crown* was due to the entry of water through the bottom of the vessel, which was not caused by unseaworthiness. Under these circumstances the court very properly held that the negligence of the owners, in not making the ship seaworthy in

respect of her steering gear, did not render them liable. That decision has no bearing whatever on the present case, because in that case the ship owner was not relying upon the Harter Act for its defense. If a shipowner negligently fails to make his ship seaworthy in some respect, and the cargo of the vessel is later damaged by sea perils, to which the unseaworthiness does not contribute in any way, the shipowner is, of course, protected by the usual stipulation in his bill of lading against liability for damage due to perils of the sea. Such a stipulation was valid before the Harter Act and is equally valid now. If, however, in the case supposed, the damage is due not to sea perils but to negligence in navigation, the shipowner is not protected. In the latter case, a stipulation relieving the carrier from liability for the negligence of his servants was invalid before the Harter Act, and it is equally invalid now, unless the shipowner has complied with the conditions laid down in the 3rd section of the Harter Act, in which event such a stipulation in the bill of lading is superfluous.

The foregoing analysis of the law, as modified by the Harter Act, discloses the fallacy involved in the briefs which were filed in this case by *amici curiae*, and which are quoted at pages 61 and 62 of the petitioner's brief.

These briefs were served on the respondents' counsel so short a time before the petition for *certiorari* was submitted that respondents had no opportunity to answer them. The first of these briefs contains the following erroneous statement:

> "By the decision of the Circuit Court of Appeals, Section 3, instead of granting benefits, imposes a burden which did not exist before the statute was enacted."

The second of these briefs contains the same fallacious statement, and also contains the following amazing misstatement of the law:

> "Therefore, under the decision of the Circuit Court of Appeals, if the shipowner failed to make his vessel seaworthy, he would be liable for losses due to the Act of God, the public enemy, the inherent vice of the thing carried, insufficiency of package, or seizure under legal process, even though the vessel's lack of seaworthiness had no possible connection with the loss, and although the goods suffered no damage whatsoever from the vessel's lack of seaworthiness."

Respondents' counsel are unable to comprehend how lawyers familiar with the maritime law of this country could make the statements quoted above. The Harter Act does not impose any liability at all. The first two sections of the Act are merely declaratory of the law as it stood before they were passed. They forbid carriers to insert in their bills of lading clauses relieving them of liability for their own negligence or the negligence of their servants; and such clauses were, of course, void at common law (see quotation from *The Jason*, *supra*, p. 41). The third section of the Act gives the carrier a conditional exemption from liability for losses due to certain specified causes. If a shipowner complies with the conditions laid down in this section, the section gives him certain protection which he already had at common law (*e. g.*, in respect of acts of God and public enemies—cf. *The Maggie Hammond*, 9 Wall. 435, at p. 444); it also gives him, *proprio vigore*, certain protection (*e. g.*, in respect of sea perils) which he could otherwise obtain by contract; and certain protection

(*i. e.* in respect of the negligence of his servants) which he could not legally obtain in any other way than by compliance with this section. A shipowner who does not comply with these conditions is in exactly the same position as before the Act was passed. He can exempt himself, by the terms of his bill of lading from liability for damage due to perils of the sea, latent defects and similar causes, but he cannot exempt himself from liability for damage due to negligence.

If the authorities cited by the petitioner are considered with the foregoing principles in mind, it will be found that none of them has the slightest bearing on the present case, with the exception of the dictum of the United States District Court for the Southern District of New York in *The Turret Crown* case, and the article by Mr. Green in the Harvard Law Review.

When the case of *The Turret Crown* came up in the Second Circuit (275 Fed. Rep. 961), the trial court decided that the shipowner had used due diligence with respect to the fuel tanks of the vessel; but not with respect to the steering gear; that both the fuel tanks and the steering gear were unseaworthy; that the tanks were damaged by heavy weather, causing damage to the cargo; but that the condition of the steering gear did not contribute to the damage. On these facts he held that the vessel was not liable. As already pointed out, this decision was perfectly proper. The damage having been caused by latent defects or perils of the sea, the shipowner was not dependent on the Harter Act for protection; and although the shipowner had not complied with the terms of the Harter Act and was not entitled to its benefits, he was, nevertheless, fully protected by the terms of his bills of lading. After reaching this decision, which was perfectly sound as a matter of law, the

court, unfortunately, by way of dictum, made the statement quoted at the bottom of page 40 of the petitioner's brief, to the effect that if negligence in navigation contributed to the bottom damage, it was excused by the Harter Act. This inadvertent statement was clearly erroneous. The case was later reversed by the Circuit Court of Appeals, which found that the owner's lack of due diligence in respect of the steering gear did in fact contribute to the bottom damage.

Accordingly, the petitioner's authorities consist of a dictum of a District Court, in a case which was later reversed by the Circuit Court of Appeals (297 Fed. Rep. 766; petition for certiorari denied 264 U. S. 591); and an article in the Harvard Law Review which was written prior to some of the strongest expressions of this Court on the point in question, and which, of course, has no force as a precedent. In speaking of the carrier's obligations with respect to the Harter Act, Mr. Green says (Petitioner's Brief, p. 60):

> "But so far as concerns liability for damage to cargo, his only duty is to avoid such damage, and, if no damage results from his lack of diligence, the carrier is at liberty to be as careless as he pleases. If his lack of diligence does not contribute to the damage, he has used all the diligence that was due, and the proviso is fulfilled."

It would be difficult to state a rule more diametrically opposed to the spirit and purpose of the Harter Act. If Mr. Green's view is correct, the third section of the Harter Act should have read:

> "A shipowner shall not be liable for damage resulting from any negligence in the navigation

> or management of his ship, to which his own lack of due diligence in making the ship seaworthy and manning and equipping her for the voyage does not contribute."

Instead of using some such language as this, Congress made the exemption absolutely and clearly conditional on the use of due diligence. Congress may well have had in mind the fact that laxity and carelessness on the part of the management is likely to be reflected in the attitude of the officers and crew. Whatever the reason, the language of the Harter Act makes it clear that Congress did not intend, as suggested by Mr. Green that,

> "the carrier is at liberty to be as careless as he pleases"

and still enjoy the protection of the third section of the Harter Act, so long as his carelessness does not contribute to the damage to cargo. On the contrary, the language of the Harter Act is——

> "that *if the owner * * * shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied* neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel * * *." (Italics ours.)

The suggestion that the Harter Act should be so interpreted as to bring it into accord with the law of England, where there is no such statute, scarcely requires discussion in this Court. Even in the absence of statute, the Federal courts have always held that it was against public policy for a common carrier to exempt himself

from liability for damage due to the negligence of himself or his servants. For more than a century, there has been no such public policy in England, where contracts affording such an exemption are unquestionably valid. *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, at page 447. In such a situation, the desirability for international uniformity may be a proper subject for consideration by Congress, but it can have no weight with the courts.

The so-called Hague Rules represent an effort to bring about precisely the international uniformity which the petitioner asks this Court to establish by judicial decree. These rules have become British law by the British "Carriage of Goods by Sea Act, 1924"; but, although they have been under consideration by Congressional Committees for several years, they have not yet been adopted in this country. Just what bearing the pendency of this legislation has on the present case is not clear to us. If the petitioner's suggestion is that such legislation is so desirable that it should be anticipated and put immediately into effect by decision of this Court, the suggestion requires no reply. If, on the other hand, the petitioner's suggestion is that the Hague Rules are to be regarded as a codification of the existing law of the United States, it is negatived by the entire history of the Rules, as disclosed by the report of the American representatives at the International Conference at Brussels in 1922, and by the various Congressional hearings on the subject. We refer the Court to the following public documents:

> "Report of the Delegates of the United States to the International Conference on Maritime Law,

Fifth Session, at Brussels, Belgium, October 17-26, 1922."

"Hearings relating to the Carriage of Goods by Sea before the Committee on the Merchant Marine & Fisheries, House of Representatives, 67th Congress, 4th Session, February 13th and 14th, 1923."

"Hearings relating to the Carriage of Goods by Sea before the Committee on the Merchant Marine & Fisheries, House of Representatives, 68th Congress, 2nd Session, January 28th and 29th, 1925."

The precise point now under consideration was discussed at the hearing before the House Committee on the Merchant Marine & Fisheries on February 13th and 14th, 1923. At that hearing Mr. Norman B. Beecher appeared and made a statement with respect to the Hague Rules. At the time of this hearing Mr. Beecher was Special Admiralty Counsel to the United States Shipping Board. He had attended the Brussels Conference as one of the representatives of the United States, the other being Hon. Charles M. Hough, one of the Judges of the United States Circuit Court of Appeals for the Second Circuit. Before occupying these official positions, Mr. Beecher had enjoyed a long and distinguished career as a specialist in admiralty law at the New York City Bar.* In the course of his argument before the Committee, Mr. Beecher made the following statement (at p. 15):

> "This section constitutes a modification of the Harter Act in that it does not make it a condition precedent to the carrier receiving the benefit of these exceptions that he shall have exercised

* Mr. Beecher was a member of the same firm as Mr. Hupper, whose brief as *amicus curiae* is quoted at page 61 of petitioner's brief.

due diligence to make the ship in all respects seaworthy—properly manned, equipped, and so forth. It is true that the shipowner is under that obligation just as fully as before. It is an affirmative duty resting upon him, and the shipper may always recover where the damage or loss is the result of a failure on the part of the shipowner to comply with the affirmative obligation placed upon him of exercising due diligence with respect to the seaworthiness of the ship and, in addition, as I have just pointed out, the carrier himself is under the obligation, contrary to the ordinary principles of American law, of proving affirmatively that he has exercised due diligence.

"The change in reality, would affect but few cases. It presents such a situation as this: Suppose a ship sails from New York and, in going down the harbor, owing to an error of the master, she comes into collision with another ship. The compass has not even had the cover taken off; the navigation is all in full view and it is simply an error of navigation on the part of the master, but it is found that the compass is out of order. Now, as that unseaworthiness had not the slightest cause in connection with the disaster, as no one ever looked at the compass, even, it would seem that the shipowner should not be liable, should not be deprived of the Harter Act exemption from liability, as a result of the error of navigation, but probably under existing law that would be the case. Now, this changes that. It says in effect, that the carrier, whenever there is unseaworthiness, whenever he has failed in the duty of due diligence, to have the ship seaworthy and whenever that has resulted in a damage or loss, he must pay for it; but it does not deprive him of

> the benefit of these exceptions where that failure on his part has had nothing whatever to do with the disaster."

The foregoing quotation shows clearly that Mr. Beecher understood the present law to be as found by the Circuit Court of Appeals in this case; and that he understood the Hague Rules as designed to change the law in this respect.

Cases arising under the Act of 1851 (U. S. Comp. Stat. 8021, Rev. Stat. 4283) can have no possible bearing on the interpretation of the Harter Act. The Act of 1851 provides as follows:

> "Sec. 4283. (*Liability of owner not to exceed his interest.*) The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending."

It is clear from the language of this statute that the shipowner only loses his right of limitation by reason of his privity with the particular damage or loss claimed. The fact that he is privy to some defect or unseaworthiness having no bearing on the loss or damage is immaterial. The Harter Act, however, is framed on an entirely different theory. As this Court has repeatedly and clearly pointed out, the exemption which it grants is

strictly conditioned on the use of due diligence to make the vessel seaworthy.

In closing under this head, we wish to refer to the facts mentioned elsewhere in this brief, which clearly establish that there was in fact a causal relation between the unseaworthiness of the *Willdomino* and the stranding which caused the damage to libellants' cargo. Even the petitioner does not suggest that the unseaworthiness must be the proximate cause of the loss. Such a suggestion would involve a too flagrant disregard of the language of the Harter Act. The petitioner's argument is that there must be a casual connection; and such a connection is clearly established in this case. The facts of the present case are that a shipowner deliberately sends his vessel to sea with insufficient fuel and, in consequence, it becomes necessary for her to skirt a dangerous and unfamiliar coast, while proceeding from one port to another in search of fuel; while so proceeding, the vessel strands through the negligence of her navigators. To permit the shipowner to have the benefit of the third section of the Harter Act under such circumstances would be to ignore the plain language and the clear intent of that section.

POINT III.

Owing to the deviations of the *Willdomino* from the voyage specified in the bills of lading, the petitioner has forfeited all protection under the clauses of its bills of lading, and is liable as an insurer of libellants' goods.

> "It has long been established law that a deviation changes the character of a voyage so essentially that the shipowner who has deviated can-

not claim the benefit of the terms of the bill of lading. The unjustifiable deviation vitiates or avoids the contract of carriage. *Gibaud* v. *Great Eastern Ry. Co.* (1921), 2 K. B. 426; *Morrison* v. *Shaw* (1916), 2 K. B. 783, 86 L. J. K. B. (N. S.) 97; *International, etc., Werken* v. *McAndrew & Co.* (1909), 78 L. J. K. B. (N. S.) 691, 693; *Thorley* v. *Orchis Steamship Co.* (1907), 1 K. B. 660, 76 L. J. K. B. (N. S.) 106, 595, 10 Asp. M. C. (N. S.) 431; *Leduc* v. *Ward*, 20 Q. B. D. 475; *Lawrence* v. *Minturn*, 17 How. 100, 15 L. Ed. 58; *Constable* v. *National S. S. Co.*, 154 U. S. 51, 14 Sup. Ct. 1062, 38 L. Ed. 903; *Mobile & Montgomery Railroad Co.* v. *Jurey*, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527; *Chubb* v. *7800 Bushels of Oats*, 5 Fed. Cas. 663, No. 2,709; *Knox* v. *The Ninetta*, 14 Fed. Cas. 827, No. 7,912; *Thatcher* v. *McCulloh*, 23 Fed. Cas. 891, No. 13,862; *The Rebecca*, 20 Fed. Cas. 373, No. 11,619; *The Thomas P. Thorn*, 23 Fed. Cas. 1002, No. 13,927; *Stinson* v. *Wyman*, 23 Fed. Cas. 108, No. 13,460; *Vernard* v. *Hudson*, 28 Fed. Cas. 1162,, No. 16,921; *The Waldo*, 28 Fed. Cas. 1356, No. 17,056; *The Wellington*, 29 Fed. Cas. 626, No. 17,384; *Pacific Coast Co.* v. *Yukon Independent Transportation Co.*, 155 Fed. 29, 83 C. C. A. 625; *The Citta di Messina*, 169 Fed. 472, 475; *The Sarnia*, 278 Fed. Rep. 459, at page 463.

See also, *The St. Johns*, 263 U. S. 119."

A deviation not only avoids the bill of lading but makes the carrier liable as an insurer.

"It is obviously advantageous, if not essential, to libellants' case, to show that the facts found constitute deviation. That 'deviation' is a term of art, belonging in the main to the law of marine

insurance, and to be interpreted by that law, seems to me to have been overlooked in argument; and this belief on my part must excuse some review of the subject.

"If an insured shipowner fails to pursue that course of navigation which experience and usage have prescribed as the safest and most expeditious mode of proceeding from one voyage terminus to the other, he violates a tacit but universally implied condition of the contract between himself and his underwriter, who is therefore freed from liability for loss subsequent to deviation because the assured has enhanced or varied the risks insured against. 2 Arnould, Mar. Ins. (8th Ed.) §376; 1 Phil. Ins. §977.

"If the assured cargo owner have his cargo on a vessel which deviates, he for the same reason may lose (though by no fault of his own) all remedy for subsequent loss against his underwriter, but may proceed against the wrongdoing ship for his damages. It is not, of course, necessary that a cargo owner, in order to recover against his carrier for losses subsequent to deviation, should have himself lost insurance protection by reason thereof. The voyage is the same, whether viewed from the standpoint of insurer or shipper, and any deviation therefrom will cast subsequent loss of or injury to either ship or cargo on the ship owner. The reason also is the same, viz., that the carrier by deviating from a voyage described alike in insurance policy and bill of lading, has broken the warranty not to deviate, thereby terminated his own insurance, and given the shipper a right either to rescind the contract of shipment and treat the goods as converted by the deviator, or to accept the goods, holding the ship

responsible for damage subsequent to warranty broken, without any reference to the question whether the deviation had any bearing on the particular loss complained of. *Thorley* v. *Orchis S. S. Co.*, 1 K. B. (1907) 660; *Thatcher* v. *McCulloh, Olcott*, 365 Fed. Cas. No. 13,862."

Hough, *J.*, in *The Citta di Messina*, 169 Fed. Rep. 472, at pages 474-475.

To the same effect see:

The Dunbeth (1897), P. Div. 133, at page 135;
Scaramanga v. *Stamp*, 5 C. P. Div. 295, p. 306;
Davis v. *Garrett*, 6 Bing. 716, at p. 724, 130 English Reprints 1456, at p. 1460;
Leduc v. *Ward*, 20 Q. B. Div. 475, at p. 482;
Bond v. *The Cora*, 3 Fed. Cases No. 1620, p. 841;
Johnson v. *N. Y. Central R. R. Co.*, 33 N. Y. 610, at p. 612;
Knox v. *The Ninetta*, 14 Fed. Cases 827, No. 7,912;
Carver on Carriage of Goods by Sea, 6th Edition, at p. 398;
American & English Encyl. of Law, Vol. 7, at p. 208.

In recent years it has become a common practice to insert in ocean bills of lading one or more clauses giving the vessel very wide privileges of deviation. Such clauses have been very strictly construed. In *Morrison* v. *Shaw* (1916), 2 K. B. 783, the plaintiffs sued the defendant for the loss of a shipment of wool, which was received aboard the defendant's ship at Napier, N. Z., for carriage to London. After the plaintiff's goods were received

aboard ship, a parcel of frozen meat was laden on board for France, and the master received orders to deliver the meat at Havre before going to London. When the ship was about eight miles from Havre she was torpedoed by a German submarine, and sank with her entire cargo. The distance via Havre to London was only fifty-four miles longer than the direct route to London. The bill of lading contained a clause giving the vessel liberty "to call and stay at any intermediate port or ports to discharge or take on board passengers, cargo, coal or other supplies", on the way to London. The Court of Appeal held that Havre was not an intermediate port and, therefore, the vessel was guilty of a wrongful deviation in proceeding to Havre. Accordingly, it was held that the defendants were not protected by the provisions of their bill of lading exempting them from liability for damage caused by the King's enemies.

In *Leduc* v. *Ward,* 20 Q. B. Div. 475, 6 Asp. Mar. Cases (N. S.) 290, the bill of lading gave the vessel liberty "to call at any ports in any order", on a voyage from Fiume to Dunkirk. The vessel was lost while going into Glasgow.

In giving judgment, Lord Esher, M. R., said (at pp. 481-2):

> "In the present case liberty is given to call at any ports in any order. It was argued that that clause gives liberty to call at any port in the world. Here again, it is a question of the construction of a mercantile expression used in a mercantile document, and I think that as such the term can have but one meaning, namely, that the ports, liberty to call at which is intended to be

given, must be ports which are substantially ports which will be passed on the named voyage. Of course such a term must entitle the vessel to go somewhat out of the ordinary track by sea of the named voyage, for going into the port of call in itself would involve that. To 'call' at a port is a well-known sea-term; it means to call for the purposes of business, generally to take in or unload cargo, or to receive orders; it must mean that the vessel may stop at the port of call for a time, or else the liberty to call would be idle. I believe the term has always been interpreted to mean that the ship may call at such ports as would naturally and usually be ports of call on the voyage named."

In *South Atlantic S. S. Line* v. *London-Savannah Naval Stores Co.*, 255 Fed. Rep. 306, the bill of lading gave the vessel liberty "to call at any port or ports, in or out of the customary route, in any order whatsoever, to receive or discharge coals, cargo, passengers, or for any other purpose". Under this bill of lading it was held that the vessel had the right, after receiving a part cargo of naval stores at a U. S. Atlantic or Gulf port, destined for Bristol, England, to complete her cargo by receiving other merchandise, destined for another port or ports in Great Britain, or on the Continent of Europe, and to stop at such other port or ports before going to Bristol. It was proved in the case that this practice was customary in the trade and was known to the shipper who appeared as libellant in that case.

In the case of *The Blandon*, 287 Fed. Rep. 722, the bill of lading gave the ship liberty "to call at any port or ports in or out of the customary route,

in any order". It was held that this justified the vessel, after loading a part cargo at New York, destined for Valencia, Spain, in proceeding to Philadelphia to complete her cargo for Spanish ports; but that it did not justify her in returning to New York before beginning her voyage to Spain. The supplemental opinion of Judge Learned Hand in this case contains a valuable review of the authorities and a very helpful discussion of the principles involved.

The decision in *The Blandon* was followed in the later case of the *Emelia S. de Perez,* decided by Judge A. N. Hand in the Southern District of New York, and reported in 1923 American Maritime Cases, p. 42.

We think the result of the authorities may be summed up as follows: Where the bill of lading does not expressly give the vessel liberty to call at ports outside the customary route, it will not be construed as giving this privilege, no matter how general the language used (cf. *Leduc* v. *Ward, supra*—"at any ports in any order"). Even where the bill of lading expressly gives the vessel liberty to call at ports outside the customary route, the provisions to this effect will be construed with reference to the principal voyage involved, and will not be held to justify an unreasonable departure from this voyage (cf. the reasoning in *The Blandon* and *South Atlantic Co.* v. *London Co.*).

We will now consider the application of the general principles above set forth, to the facts of the present case. In this case the bills of lading contain three clauses which require consideration in this connection. Two of these clauses are printed in the body of the bills

of lading and are as follows (Claimant's Exhibits A and B; R. 916-7):

> "with liberty to call at intermediate ports or any port or ports in or out of the customary route in any order, to receive and discharge coal, cargo, passengers, and for any other purposes. * * * The ship has liberty of filling up and/or bunkering at any port or ports in or out of the way."

The third clause to be considered is written at the bottom of the bill of lading, with pen and ink, and reads as follows:

> "Filling up only in ports on the way westwards of New York."

As we have already stated, it was not disputed at the trial that the word "of" in the clause last above quoted, is an error and should read "to" (*supra*, p. 4). This is the way the clause reads in other bills of lading which were offered in evidence (Libellants' Exhibits 10 to 14; R. 1326 to 1330). Accordingly, we will discuss the case as though the clause read, "filling up only in ports on the way westwards to New York". The only witness who testified as to the meaning of this clause, testified without objection, that it meant that the steamer "has the privilege, after she leaves the port of Messina, to stop at any port on her regular route to New York, to take on extra cargo" (Gurge, R. 840, 841). This construction of the clause was so obviously correct that the petitioner's counsel withdrew the objection which he had previously made to the witness' testimony; and under these circumstances the respondents deemed it unnecessary to call any further experts on the subject.

The only question which remains, as to the interpretation of this clause, is whether it restricts the vessel's liberty in respect of bunkering. The lower courts took the view that, as the second printed clause quoted above, drew a distinction between filling up and bunkering, the written clause applied only to receiving cargo and left the vessel unrestricted in respect of bunkering (Opinion, R. 1379). We respectfully submit that this interpretation unduly limits the effect of the written clause. It is obvious that the written clause was intended as a drastic restriction of the very wide liberty of deviation granted by the printed provisions of the bills of lading. Instead of having the privilege of proceeding to any port reasonably adjacent to the trans-Atlantic route, the shipowner agreed that the vessel should make a direct voyage to New York, subject only to completing her cargo at ports along the regular route to New York. To hold that the vessel still had the privilege of going to any port in the North Atlantic for bunkers, is to defeat the obvious purpose of the written clause. It is true that the written clause says nothing about bunkers, but this can hardly have been deemed necessary, as it is almost unheard of for a vessel to go far out of her route for the purpose of obtaining bunkers. We submit that the written clause was intended to supersede the printed clauses dealing with deviation, and was intended to constitute a new and complete agreement on this subject.

That such a written clause will override the printed provisions in a document of this character is, of course, too well settled to require argument.

> "It is a well settled rule of law that if there is a repugnancy between the printed and the

written provisions of the contract, the writing will prevail. It is presumed to express the specific intention of the parties. *Hagan* v. *Scottish Insurance Co.*, 186 U. S. 423."

Thomas v. *Taggart*, 209 U. S. 385 at page 389.

Even giving the written clause the narrow interpretation placed upon it by the lower courts, however, the record shows that the *Willdomino* was guilty of at least two distinct and unjustified deviations from the voyage provided for in the bills of lading.

(1) The *Willdomino* deviated on the voyage from Ponta Delgada to North Sydney in not following the direct route; the uncontradicted testimony of the officers of the *Willdomino* establishes that they followed the course to New York for several days and then changed their course for North Sydney.

We have already pointed out that the *Willdomino* left Ponta Delgada with a supply of fuel wholly inadequate to carry her to New York. Furthermore, the supply of fuel was so grossly inadequate that it is impossible to assume that the navigators of the vessel ever had any real expectation of reaching New York without calling at North Sydney for bunkers (*supra*, pp. 18 to 28). From these facts, which have been mathematically demonstrated on the testimony of petitioner's own witnesses, it necessarily follows that the voyage on which the vessel sailed from Ponta Delgada was really a voyage to North Sydney. Instead of prosecuting the voyage to North Sydney by the usual route, however, the master of

the vessel testifies that he proceeded for a considerable distance on the direct route to New York and then altered his course to proceed toward North Sydney (*supra*, pp. 30, 31). This was a clear deviation, even if the vessel had the right to proceed to North Sydney. Assuming that the bills of lading, even as modified by the written clause, permitted the vessel to call at any port she chose for bunkers, she was still bound to proceed to any such port by the most direct and usual route. There is nothing in the bills of lading which even suggests that the vessel had the privilege of wandering about in the North Atlantic heading first for one port and then for another.

> "In the law maritime a deviation is defined as a 'voluntary departure without necessity, or any reasonable cause, from the regular and usual course of the ship insured' (1 Bouvier's Law Dict. 417; *Hostetter* v. *Park*, 137 U. S. 30, 40; *Davis* v. *Garrett*, 6 Bing. 716; *Williams* v. *Grant*, 1 Connecticut, 487); as, for instance, where a ship bound from New York to Norwich, Conn., went outside of Long Island, and lost her cargo in a storm (*Crosby* v. *Fitch*, 12 Conn. 410); or where a carrier is guilty of unnecessary delay in pursuing a voyage, or in the transportation of goods by rail (*Michaels* v. *N. Y. Central Railroad*, 30 N. Y. 564)."
>
> *Constable* v. *National Steamship Co.*, 154 U. S. 51, at page 66.

"A deviation is defined to be 'a voluntary departure, without necessity or reasonable cause, from the regular and usual course' of a voyage, in reference to the terms of a policy of marine insurance; but it is no deviation, in respect to

such a voyage, to touch and stay at a port out of its course, if such departure is within the usage of the trade."

* * * * * * * *

"The same doctrine is applicable in the case of a bill of lading, even though the usage be not known to the particular shipper, if it be established as a general usage."

Hostetter v. *Park*, 137 U. S. 30, at page 40.

"The voyage must be prosecuted without unnecessary delay or deviation. The shipowner's undertaking is that he will be diligent in carrying the goods on the agreed voyage, and will do so directly, without any unnecessary deviation."

Carver on Carriage of Goods by Sea, 6th Edition, page 393.

"A deviation is a voluntary departure without necessity or reasonable cause from the prescribed or usual course of the voyage or of the manner of performing it."

26 Cyc., at page 625.

"Deviation in the law of marine insurance is generally defined to be a voluntary departure, without necessity or reasonable cause, from the regular and usual course of the voyage insured."

* * * * * * * *

"There is an implied condition in every policy of marine insurance that the voyage shall be commenced and pursued throughout with all convenient expedition, and dispatch, and by following the shortest, safest, and most usual route."

9 American and English Encyclopedia of Law, at pages 419 and 421.

In the lower courts the petitioner sought to justify the course which was actually followed, on the ground that the vessel only headed for North Sydney in the emergency created by the shortage of fuel. This excuse might be perfectly good if the vessel had left Ponta Delgada with a supply of fuel reasonably sufficient to enable her to reach New York. No such excuse is available, however, in the face of the fact that the vessel, in compliance with the owners' express instructions, left Ponta Delgada *with barely sufficient fuel to reach North Sydney.* In view of this fact it is readily apparent that the voyage toward New York was a mere pretense. For some one of a number of reasons which may be suggested, the petitioner evidently preferred to have the vessel sail in the first instance for New York, although fully intending to have her put into North Sydney. In this connection we call attention to the fact that the vessel was in daily wireless communication with the owners (Harrisworth, R. 416).

The claimant does not suggest that it ever modified the instructions given to the master of the *Willdomino* at Gibraltar. On the contrary, the evidence of the master and chief engineer of the steamer, taken together with the testimony of Williams, the president of the petitioner, lead inevitably to the conclusion that the *Willdomino* did exactly what her owners wanted her to do. Whether this be so or not, she did exactly what they told her to do. It follows that the vessel's erratic course from Ponta Delgada to North Sydney is directly chargeable to the owners themselves, and that they are responsible for the deviation from the direct route between Ponta Delgada and North Sydney. We have already pointed out that if the vessel had taken the proper and customary supply of fuel for the voyage from Ponta

Delgada to North Sydney and had then proceeded to North Sydney by the most direct route, the stranding would never have occurred (*supra*, pp. 33, 34). Accordingly, we submit that the deviation of the vessel on her voyage from Ponta Delgada to North Sydney was a very serious breach of the contract of affreightment and is, in itself, sufficient to render the claimant liable as an insurer.

Since the petitioner's brief was printed, respondents' counsel have received certain *errata* to be inserted on pages 7 and 15, together with copies of a chart on which the petitioner has traced the course of the *Willdomino* from Lisbon to North Sydney. While we do not challenge the accuracy of the tracings on this chart, we disagree with some of the conclusions drawn from them by the petitioner. This Court will undoubtedly appreciate how misleading it is to project the course of a vessel on a flat surface. The result is analogous to the results produced on ordinary maps of the world, which enormously exaggerate the relative size of the far northern countries.

One would naturally suppose that the course between any two ports would be a straight line from one to the other, but this is not true when the course is projected on a flat surface. Accordingly, we respectfully submit that this Court cannot determine, from the examination of an ordinary chart, to what port the *Willdomino* was bound at any given time. As a matter of fact, she was never on a course which, if projected on the petitioner's chart, would lead to North Sydney. The petitioner's chart is chiefly valuable for the graphic way in which it shows the radical change of course which it was necessary for the vessel to make when she headed for

North Sydney. It shows clearly that the vessel's previous course was not the direct course for North Sydney, and we understand the petitioner, in its *errata*, now concedes this. The fact is, however, that the question what is the proper course from one port to another is a question upon which only an expert navigator is qualified to pass. The only testimony in the record on this subject is the testimony of the master of the *Willdomino*, who has testified positively that he followed the course to New York at all times, excepting when he turned south to Ponta Delgada on account of engine trouble, and after he turned north to put into North Sydney on or about July 16th. Furthermore, he testified specifically that if he had intended to proceed from Ponta Delgada direct to North Sydney, he would have followed a different course and, specifically, would have gone north of Fayal (*supra*, pp. 30, 31), which, as petitioner's chart shows, he did not do. The other passage which the petitioner cites from his testimony (R. 313), does not contradict the passage cited above but merely asserts that the change of course was slight. The Court can readily judge from petitioner's chart whether the change was slight or, as we contend, very material. In its *errata* petitioner suggests that the master was holding a southerly course on account of icebergs. Not only is this suggestion wholly unsupported by any testimony in the record, but it is flatly opposed to the master's testimony. Having put in its evidence on one theory, we submit that it is now too late for the petitioner to urge another theory which is opposed to its evidence and is supported only by argument of counsel. We think that this Court may almost take judicial notice of the fact that the middle of July is not a dangerous season for icebergs.

Both this statement and a number of petitioner's other statements as to the significance of the courses followed by the *Willdomino* are contrary to common knowledge and contrary also to the testimony of the master of the *Willdomino*. We respectfully submit that the testimony of the master must control.

If, however, this Court is disposed to go outside the record in considering the courses of the *Willdomino*, it is important that it should have before it complete and accurate information on the subject. Such information is readily available in official publications. For example, Chart No. 1280, published by the United States Hydrographic Office, supplies a method of plotting the Great Circle courses between any two points. It also states (if any authority were needed on the point) that the Great Circle course is the shortest distance between any two points. Using this chart (H. O. 1280), we have traced the Great Circle course between Ponta Delgada and Sydney and the Great Circle course between Ponta Delgada and New York, and have projected them on a copy of the petitioner's chart (H. O. 1070) together with the actual course of the *Willdomino*. On examination of this chart, which we have attached to this brief as an appendix, the Court will note that the actual course of the *Willdomino* was not between the Great Circle courses for New York and North Sydney, as suggested by the petitioner, but was actually south of both, although it is very close to the Great Circle course to New York.

We have also shown the vessel's course on leaving Lisbon, and a section of the Great Circle course from Lisbon to New York, from which the Court will note that the *Willdomino* left Lisbon on a course substantially south of the Great Circle course to New York.

Of course, when projected on a flat surface, a Great Circle course, although the shortest distance between two points, appears as a curve. With this point in mind, the Court will note that when the *Willdomino's* course was changed on the 16th of July, she did follow, thereafter, substantially the Great Circle course from the point of deviation to North Sydney. It is obvious that she had not been making for North Sydney before that date.

We are filing with the Clerk of the Court a copy of Chart H. O. 1280; and also a copy of Reid's Tables of Distances, which has been referred to in the briefs of both parties.

(2) In proceeding to North Sydney instead of to New York direct, the *Willdomino* would have been guilty of an unjustified deviation, even if she had proceeded from Ponta Delgada to North Sydney by the most direct route.

We have pointed out above that the *Willdomino*, after leaving Ponta Delgada, followed the route to New York for several days and then headed for North Sydney. The purpose of our present argument is to point out that even if the vessel had taken the most direct route to North Sydney, without any pretense of sailing for New York, she would still have been guilty of an unjustifiable deviation from the voyage specified in the bills of lading. Our basis for this argument is that the steamer did not go to North Sydney for bunkers to carry her to New York but for bunkers to be used on her return voyage to Europe. It is true that the witness, Williams, president of the petitioner, would not admit this in so many words,

but it is perfectly clear both from his testimony and from the undisputed facts of the case. Indeed, a glance at any map showing both shores of the North Atlantic will show how absurd it would be for a vessel proceeding from a Mediterranean port to New York, to stop at North Sydney or any other Canadian port for bunkers to carry her to New York. The inference to be drawn from the map is confirmed by the record.

The prices of coal at the various ports involved were as follows:

Gibraltar, $27.00 to $30.00, according to a disinterested witness called as an expert by the libellants (Gurge, R. 841); or $30.00 to $40.00 according to the witness, Williams (R. 857).

Ponta Delgada, 8 pounds 15 shillings, or say $33.00 (Beeby, R. 348; Williams, R. 858).

North Sydney, $13.00, according to Beeby (R. 348); $7.00 to $9.00 according to Williams (Canadian money value, R. 857).

New York, $17.00 to $23.00 according to libellant's expert Gurge (R. 842).

On the foregoing testimony we believe that the following prices may be adopted as fairly correct:

Gibraltar	$30.00
Ponta Delgada	33.00
North Sydney	10.00
New York	20.00

We have already pointed out that if the *Willdomino* had taken on board 250 tons of additional coal at Ponta Delgada she would have been seaworthy to proceed direct to New York. The difference between the cost of this coal at Ponta Delgada and North Sydney would have been, say $23.00 per ton or $5,750.00. The additional distance which the vessel had to steam by reason of going to North Sydney was estimated at 500 miles by libellants' expert, McNaught (R. 811) and at 300 to 400 miles by Williams, the president of the petitioner (R. 860).

Taking the lowest figures given by Williams himself, it would take the vessel (going 6½ miles per hour and burning 50 tons of coal a day) at least two days to steam this additional distance. The witness Williams stated that the *Willdomino* was worth $4,200 a day to the claimant company (R. 227). Accordingly, the value of the time lost in going into North Sydney would be $8,400. In addition, the vessel would burn an additional 100 tons of coal during these two days, which, even at the North Sydney price, would cost $1,000. Accordingly we have an expense of $9,400 for the purpose of saving $5,750.

On the other hand, if the *Willdomino* went to North Sydney for the purpose of obtaining bunkers to be used on her next outward voyage from New York, a considerable saving would be effected. The *Willdomino's* bunkers had a capacity of 1,450 tons (Williams, R. 234). Accordingly, if the bunkers were filled at North Sydney at a price of $10 per ton less than the New York price,

there would be a net saving of $8,250, made up as follows:

Saving on 250 tons of coal between Ponta Delgada and North Sydney price....	$ 5,750.00
Saving on say 1,200 tons of coal with which vessel would reach New York, as between North Sydney and New York price	12,000.00
Total	17,750.00
Less expenses as figured above	9,500.00
Net saving	$ 8,250.00.

The petitioner's own testimony, however, shows that one of their principal reasons, if not the controlling reason, for having the vessel coal at North Sydney, was that there was difficulty, at this time, in obtaining bunkers for foreign vessels in American ports. The witness Williams, president of the petitioner, refers to this point repeatedly. He testified as follows:

> "Q. But did you give your master standing orders to coal at Sydney? A. I don't know as he had standing orders. We have made it a sort of practice to coal at North Sydney; as I recall it, along about that period we were having great difficulty in getting ship's bunkers on the Atlantic Coast of the United States, as you know in those days there were many embargoes on coal, and so on" (R. 71, 72).

He repeated this same statement in varying forms at least half a dozen times (See, for example, R. 74, 235, 854,

855, 858, 859). Indeed, this point was so thoroughly impressed on everybody at the trial that the learned District Judge embodied it in his opinion, as follows:

> "The *Willdomino* was a British ship and at the time in question there were restrictions upon the supplying of bunkers to foreign ships on the Atlantic coast of the United States. The claimant had been obtaining its bunkers at Sydney and Halifax" (R. 1388):

Curiously enough, both the petitioner and the learned District Judge appear to have overlooked the fact that the difficulty of obtaining bunkers in American ports had nothing to do with the westward voyage. Any embargo or coal shortage in the United States would be material only in connection with the vessel's next outward voyage, with which these libellants had no concern. The importance of this point appears to have dawned upon the petitioner in the later stages of the trial. Early in the trial the witness Williams, president of the petitioner, testified as follows:

> "Q. Did you anticipate that when the vessel sailed from Ponta Delgada that she would go to Sydney and there take on approximately 1,400 tons of coal? A. No. We may have given him orders to proceed to the nearest coal port, which would have been North Sydney from Ponta Delgada.
>
> Q. If he could have gotten it there, was it the duty of the master when he got to Sydney to fill up his bunkers with coal there?
>
> Mr. Sprague: I object to that question as to what the duty of the master was.

The Court: I will permit it.

A. *It might be considered his duty, but since we were able to get in touch with North Sydney we would have given the instructions*" (R. 234, 235).

Near the end of the trial he evidently realized the danger of even this very guarded admission, for he qualified this testimony as far as it was possible for him to do, in view of what he had already said. His later testimony was as follows:

"Q. When you sent this cable to your master directing him to go to Sydney, didn't you intend that he should at North Sydney take on bunkers for the return trip to Europe? A. No, sir. *We hadn't any voyage fixed.*

Q. Well, for the next trip that this vessel should make to sea? A. No, sir.

Q. You didn't intend that he should take on enough coal to go to sea again? A. *No, sir, hadn't any next voyage in mind.*

Q. Did you intend that he should take on enough coal at North Sydney to coal some other ship of yours from an Atlantic port to sail? A. No, sir.

Q. Now, that is exactly what the *Willdomino* had done on the preceding trip, wasn't it? A. *After we arrived at North Sydney, we did that, yes*" (R. 862).

We have italicized the portions of the witness, Williams' testimony which seem to us to show clearly his purpose to evade the issue and take refuge in that fact that no orders had actually been given to the *Willdomino* to fill her bunkers at North Sydney, and that the vessel's

next voyage had not yet been actually fixed. We submit that it is perfectly plain from his testimony that the whole purpose of sending the vessel in to North Sydney was to procure bunkers for her next voyage from the United States, and that instructions to this effect, although they had not yet been actually given, would certainly have been given when the vessel reached North Sydney, if it had not been for the labor troubles which existed there. These troubles made it necessary to divert the vessel to Halifax, where the bunkers would undoubtedly have been filled, but for the stranding. If this were not so, all of Williams' testimony about the difficulty of obtaining bunkers in American ports would be meaningless.

Once it is established that the purpose of going to North Sydney was to procure bunkers for the next voyage, the voyage to that port becomes an unjustified deviation.

In the first place, it is settled that even the wide liberties granted by the printed clauses in claimant's bills of lading, will be construed as applying only to matters connected with the voyage for which the bill of lading is issued. In *Austrian, etc., Co.* v. *Calafiore*, 194 Fed. Rep. 377, a steamer which had the same wide liberties which the *Willdomino* would have had, if her printed bills of lading had not been modified by the written clause, was proceeding from Mediterranean ports to New Orleans. She stopped at Tampa to take on some cargo which was to be carried back to the Mediterranean on her return voyage. The Circuit Court of Appeals for the 5th Circuit said that, notwithstanding the wide liberties granted by the bills of lading, the ship was

guilty of an unjustified deviation because the stop at Tampa had nothing to do with the westward voyage. In the course of its opinion, the Court said (at p. 378):

> "The reservation in the bill of lading on which the claimant relies to relieve itself from liability for delay and detention at Tampa must be construed with reference to the voyage in contemplation of the shipowner and the shippers at the time the bill of lading was issued, and therefore be restricted in allowing deviation to the business and necessities of the ship pertaining to that voyage. See *Swift* v. *Furness, Withy & Co.*, 87 Fed. 345; *Liverpool Steamship Co.* v. *Phoenix Ins. Co.*, 129 U. S. 441, 9 Sup. Ct. 469, 32 L. Ed. 788; *Pacific Coast Co.* v. *Yukon Independent Transport Co*, 155 Fed. 35, 83 C. C. A. 625; *Leduc* v. *Wood*, 20 Q. B. D. 482; *Glynn* v. *Margretson* (Appeal Cases) L. R. 1893, page 355."

This principle is precisely applicable to the present case.

Furthermore, coal which is not intended to be used on the pending voyage cannot properly be referred to as "bunkers"; so far as the pending voyage is concerned, such coal is a part of the cargo. Accordingly, in taking on coal for her next voyage, the *Willdomino* would not have been bunkering, but would have been "filling up" within the meaning of the written clause on the bills of lading.

Respondents proved by uncontradicted evidence that neither North Sydney nor Halifax was a customary coaling port for vessels proceeding from Mediterranean ports to New York (Jeffcott, R. 799, 800; McNaught, R. 808, 809; Gurge, R. 841).

The only evidence to the contrary is that of the witness Williams, who merely stated "We have made it a sort of practice to coal at North Sydney". Even this statement appeared to have a very meagre foundation, as it only appeared definitely that the *Willdomino* had stopped at North Sydney on one previous occasion, at which time she was in ballast and no cargo interests were involved (Williams, R. 862, 863). But, however this may be, a "sort of practice" of the petitioner falls far short of establishing a general custom.

It was not even suggested that either North Sydney or Halifax was a port where it was customary for vessels proceeding from Mediterranean ports to New York to take on cargo. Libellant's expert Hayward testified as follows:

> "Q. Now, then, is the port of Sydney, Cape Breton on the usual and customary route taken by vessels from Mediterranean ports to New York? A. No, sir" (R. 837).

No attempt was made to contradict this testimony.

The petitioner suggests that the question whether the *Willdomino* went to North Sydney to obtain bunkers for a succeeding voyage, was not raised in the trial Court. This argument is sufficiently answered by the testimony quoted on pages 27 to 30 of the petitioner's brief, which shows that this point was gone into very carefully. It is the fact also that this point was fully argued in the trial Court, although this fact, of course, does not appear in the record. This point was also the subject of one of the assignments of error on which the appeal was taken (R. 1395).

Perhaps the best answer to petitioner's argument on this point is that it was only after the decision of the Circuit Court of Appeals was filed that the petitioner first suggested that it had been taken by surprise on this issue. In view of the fact that the point was fully argued and briefed in the Circuit Court of Appeals, we respectfully submit that it is too late now for the petitioner to suggest that this issue was not properly before that court.

The libel in this case was in the usual form, which, for generations has been held sufficient (*Clark* v. *Barnwell*, 12 How. 272; *The Folmina*, 212 U. S. 354, at p. 361); and the question of deviation arose in the course of the petitioner's defense at the trial. If the petitioner considered that the issue was not within the pleadings, this point should have been raised in the trial Court or, at latest, in the Circuit Court of Appeals.

The cases cited by the petitioner (Petitioner's Brief, pp. 24 and 25) of voyages which have no definite beginning or end, have no bearing on the present case. In the trade referred to, it is customary for vessels to load and discharge at various American ports and such a custom fully protects the shipowner, for it is presumed to be known to the shipper. Furthermore, it is to be assumed that vessels which follow this course have not inserted in their bills of lading any restriction on the wide liberties granted in the usual deviation clause, as was done here by the written clause with respect to "filling up". In the present case the call at North Sydney violated equally the custom of the trade and the contract of affreightment.

The distinction between a deviation and a mere intention to deviate clearly has no bearing on the present case. The deviation in this case was fully con-

summated when the *Willdomino* put into Sydney. No case has ever suggested that the purpose for which a vessel puts into a port is not to be considered in determining whether her calling at such port is a deviation. Calling at a port for an improper purpose is a deviation, and the deviation is consummated the moment the vessel changes her course for the purpose of proceeding to such port, irrespective of whether or not the improper purpose is ever in fact carried out. The decision of the Circuit Court of Appeals on this point is clearly correct.

(3) In view of the unjustified deviations of the *Willdomino* from the voyage provided for in the bills of lading, the petitioner is not only rendered liable for all damages resulting from the stranding, but is deprived of any protection under the bill of lading clause limiting its liability to $100 per package.

This has recently been decided by this Court and by the Circuit Court of Appeals for the Second Circuit.

The St. Johns, 263 U. S. 119;
The Sarnia, 278 Fed. Rep. 459;
Niles-Bement-Pond Co. v. *Dampkiesaktieselskabet Balto, et al.*, 282 Fed. Rep. 235.

POINT IV.

As found by the Circuit Court of Appeals, the petitioner is liable, irrespective of unseaworthiness or deviation, because of its gross neglect to care for and preserve the respondents' cargo after the disaster.

(a) *The authorities.*

The law on this point has been clearly laid down by this Court in *The Niagara* v. *Cordes*, 21 How. 7, 16 L. Ed. 41, wherein Mr. Justice Clifford said (at p. 26 of 21 Howard):

> "Duties remain to be performed by the owner, or the master as the agent of the owner, after the vessel is wrecked or disabled, and after he has ascertained that he can neither procure another vessel nor repair his own, and those, too, of a very important character, arising immediately out of his original undertaking to carry the goods safely, to their place of destination. His obligation to take all possible care of the goods still continues, and is by no means discharged or lessened, while it appears that the goods have not perished with the wreck, and certainly not where, as in this case, the vessel is only stranded on the beach. Such disasters are of frequent occurrence along the seacoast in certain seasons of the year, as well as on the lakes, and it cannot for a moment be admitted that the duties and liabilities of a carrier or master are varied or in any manner lessened, by the happening of such an event. Safe custody is as much the duty of a carrier as con-

> veyance and delivery; and when he is unable to carry the goods forward to their place of destination, from causes which he did not produce, and over which he has no control, as by the stranding of the vessel, he is still bound by the original obligation to take all possible care of the goods, and is responsible for every loss or injury which might have been prevented by human foresight, skill and prudence."

At the conclusion of the opinion the Court says:

> "At that time (when the master deserted his vessel on the beach) the goods had not received any considerable injury, and most of them, in all probability, none whatever. Prompt attention would have saved the property and protected the shipper from loss. It must not be understood that a master can abandon his ship and cargo upon any such grounds as are proved by the evidence in this case, or, indeed, upon any other, so far as the goods are concerned, when it is practicable for human exertions, skill and prudence, to save them from the impending peril" (p. 35 of 21 Howard—words enclosed in parenthesis are ours).

The last citation of *The Niagara* case by this Court was in *The Jason*, 225 U. S. 32, 56 L. Ed. 969, where Mr. Justice Clifford's decision is cited with approval, as is also the decision in *The Maggie Hammond*, 9 Wall. 435, 458; 19 L. Ed. 772, 780, which holds "that when the vessel is wrecked or otherwise disabled in the course of the voyage, and cannot be repaired without too great delay and expense, it is the duty of the master to transship the goods and send them forward, if another vessel can

be had in the same or a contiguous port or within a reasonable distance, and that upon so doing he is entitled to charge the goods with the increased freight arising from the hire of the vessel so procured."

The rule laid down in the *Niagara* case is not changed or qualified in any way by the Harter Act, which specifically provides that the shipowner cannot in any way exempt himself from liability for any negligence or fault in connection with the custody, care or proper delivery of the merchandise entrusted to him. The Harter Act (Act of February 13, 1893, Sections 1, 2 and 3).

(b) *Time consumed before removing this cargo.*

It is undisputed that the *Willdomino* struck a reef off Cape Canso at 6:30 A. M., July 24, 1920; that she reached Halifax at 2:12 A. M., July 27th; left Halifax for New York under tow at 9:10 A. M., August 3rd; anchored in New York Bay at 8:20 A. M., August 7th, and made fast to Pier C, Jersey City, at 10 A. M., August 9th, 1920. The above facts all appear in the Log of the ship, Exhibit E-3 (R. 1073 to 1089). None of the citrate of lime was tendered to either libellant until the following letter was written by the Williams Steamship Company, petitioner's agent, to the Citro Chemical Co.:

"October 2nd, 1920.

Citro Chemical Co.,
Maywood, N. J.

Gentlemen:

You will please take notice that 168 casks of Citrate of Lime, which arrived on the steamship *Willdomino* from Messina, consigned to Messrs.

Goldman, Sacks & Co., and said to be the property of Citro Chemical Company of Maywood, N. J., is now on board the said steamship at Tietjen & Lang's Dry Dock, 17th Street and Park Avenue, Hoboken, N. J., and that we are now ready to deliver same.

You are hereby notified to place your lighter alongside said steamer Tuesday morning at nine o'clock for this purpose.

Yours very truly,

WILLIAMS STEAMSHIP COMPANY, INC.,
PAUL A. DWYER" (R. 1324).

Libellant replied October 4, 1920:

"We have had this shipment carefully examined and find that it is absolutely worthless by reason of the damage which it sustained while in your custody. Accordingly, we abandon it to you and decline to take delivery of it" (R. 1325).

The libellant Citro Chemical Company filed its libel October 6, 1920, four days after the letter above quoted was written by Williams Steamship Company (R. 1).

Pfizer & Company filed its libel October 1, 1920, which was before the steamship was apparently ready to make delivery (judging from the letter to Citro Chemical Company of October 2nd, p. 22).

As a matter of fact the cargo was not ready for delivery when the letter of October 2nd was written. Mr. Thirkell, the First Officer of the vessel, whose testimony was taken by petitioner October 8, 1920, testified (R. 378):

"Q. Those casks have been and are being discharged at the present time, aren't they? A. At the present time, yes.

Q. On lighters? A. Yes."

The Second Officer of the vessel, whose testimony was also taken on October 8th, testified (R. 394) that the vessel was at that time still discharging the casks of Citrate of Lime.

We refer to the above testimony of the First and Second Officers because Capt. Beeby had testified previously:

"Q. Was the cargo of citrate of lime discharged from the ship as soon as it could possibly have been discharged, practicably discharged, in your opinion? A. Yes" (R. 357).

The cargoes had not even been discharged at the time the libels were filed, ten weeks after the vessel stranded.

(c) *Condition of cargo when respondents learned of the damage.*

Mr. Haffey, Traffic Manager of Charles Pfizer & Company, testified that he kept telephoning the Williams Steamship Company for information about the *Willdomino*, and they told him that the delay was caused by her going to Halifax and that she would be down shortly; that he telephoned again August 7th, the day the ship arrived, but they did not then tell him that she had been damaged. Mr. Haffey went on his vacation August 9th, but before leaving gave instructions to make

entry in the Customs House. Such entry was made that day and his Company paid the duty on the Pfizer shipment amounting to $4,446.92 (R. 673). When Mr. Haffey returned from his vacation, August 23rd, he found his Company had not received the Citrate. He looked up the vessel, found her at 134th Street and North River, went aboard and saw the Citrate of Lime in No. 1 Hold with water not entirely covering the top tier and the rest under water (R. 674). This was the first time he had any knowledge that his cargo had been damaged (R. 675). He said the first date the shipment was tendered to him was October 2nd or 4th (R. 676). No delivery was offered prior to that time. He made several trips to the steamship's office between August 23rd and October 2nd or 4th. Mr. Haffey went on board the vessel when she was at Tietjen & Lang's Dry Dock, in September. He says:

> "When I went aboard it was somewheres on top of the deck, scattered all over, there was several casks on the deck and there was quite a number visible in the lower part of the hold" (R. 676).

Mr. Haffey says that when he went aboard the ship at Hoboken, in September, he noticed the smell of the Citrate of Lime. He says:

> "As near as I can I will say I never smelled anything like it before or since; it was simply disgusting, so much so that I lost my appetite for lunch twice, when I did smell it" (R. 677).

He said that Citrate of Lime should not smell like that: that the Citrate of Lime, at that time, several weeks

after August 23rd, was not fit to be carted to his factory (R. 678). On August 23rd, when first he saw the open hatch and the tiers in the hold Mr. Haffey did not notice that odor (R. 678). Citrate of Lime, Mr. Haffey said, is a food product and is also used for medicinal purposes (R. 679).

Mr. Haffey's testimony makes it entirely clear that his Company did not know of the condition of the Citrate of Lime until August 23rd.

The postal card notice sent by the Steamship Company to Goldman, Sacks & Co., consignee of the Citro Chemical Company shipment (Exhibit 9, R. 888) said:

> "Please remove the merchandise promptly noting that all goods remain on pier at your risk and expense, and that same may be stored, also at your risk and expense, unless removed within three days after entry of steamer.
>
> B/L No.....
>
> Freight £341-13-2."

Also the fact that the Williams Steamship Company sent a bill to the Citro Chemical Company August 14, 1920, for $1,350.93 freight, which this respondent promptly paid and received a delivery receipt dated August 16th, is further proof that it did not know of the condition of the cargo at that time.

Exhibits L-6 and L-7 (R. 1322, 1323), show that the Williams Steamship Company deliberately deceived the Citro Chemical Company in not advising it of the damage, and in collecting the freight on the representation that the merchandise was ready for delivery, giving

a delivery receipt calling for immediate delivery, and then not even offering delivery until October 2nd.

Mr. Bauer, Custom House Broker, of the firm of Hensel, Bruckmann & Lorbacher, made entry of the Citro Chemical Company's shipment in the Customs House, paid the duty amounting to $2,228.70, obtained a release from the Steamship Company and gave the papers to the truckman to get delivery. Mr. Bauer testified that when he paid the duty he had no knowledge that the shipment had been injured or damaged; that up to the time that he delivered the papers to Schafer, the truckman, he had no knowledge that the cargo had been even wet (R. 665).

Citro Chemical Company's truckman went to the Steamship *Willdomino* on August 17th, with his truck, to get the Citro Company's Citrate. The steamer was at Pier C, Jersey City. He had the freight release and delivery order which he presented to the delivery clerk. He did not get the merchandise because:

> "They told me the steamer had been damaged and was under water and the steamer would have to go to the drydock before the goods could come out of the ship" (R. 671).

When Citro Chemical Company learned of the damage to its cargo it wrote a letter on August 26th to Williams Steamship Company, saying:

> "There is a serious loss to our cargo of 168 casks of Citrate of Lime now aboard above steamer and we hereby lodge notice of claim upon you, her owners and charterers.
>
> Providing the present condition of the ma-

terial will warrant it, we will handle the shipment to best advantage and inform you, in due course of the final outturn and loss thereon" (Exhibit 12, R. 893).

The libellant Pfizer & Company wrote to Williams Steamship Company under date of September 2nd, 1920, saying:

> "Referring to the shipment of 335 casks of Citrate of Lime Ex. S. S. *Willdomino,* beg to state that from samples taken from about 40 casks out of this shipment it appears that these goods will be a total loss due to the fact that they have been in water for so long a period, and we hereby notify you that we reserve the right to file claim covering this damage which we shall do as soon as the goods are out of the steamer, *which we understand will not be for a week or more.* After a careful examination is made of the entire lot we will again take this matter up with you. We remain,
>
> Very truly yours,
>
> CHAS. PFIZER & CO., INC.,
> per CHARLES P. HAFFEY."

(Exhibit 11, R. 891).

One would think that after receiving such letters the steamship company would make every possible effort to remove the shipments, at least within the week specified. Instead, another month went by before a tender of delivery was made.

The letter written by the Citro Chemical Company to the claimant on August 26th shows its willingness to handle the shipment to best advantage (Exhibit

12, R. 893), as does the letter of Pfizer & Company to the claimant of September 2nd (Exhibit 11, R. 891).

What more, under the facts of this case, could the shippers have done? They could not get their cargo because the ship owners kept it from them. They could not even examine or get samples of the material until August 23rd and it took considerable time to have these analyzed. They did offer then to work whatever salvage there was out of the material in order to minimize loss.

(d) *Citrate of Lime deteriorates very slowly.*

Probably the most eminent chemist called in this case was Dr. Thomas H. Norton, who testified that Citrate of Lime is rather insoluble; it dissolves in warm water, one part in about 1,700; it is a little more insoluble in cold water; it is not a substance that is put in the list of soluble substances (R. 737).

Without going into a long quotation of his testimony, it is sufficient to say that it was to the effect that Citrate of Lime, once immersed in sea water, suffers little damage when first wet; that the damage is caused by fermentation; that the bacteria content, in order to do harm, must be combined either with air or more water, and that the longer the shipment remained under water and the more the water was changed, the more rapidly the material would disintegrate.

Dr. Norton also said that if the Citrate of Lime had been removed from the water it could have been processed by well known methods and a large part of its value saved.

> "I should say from familiarity with other citrates—other soluble citrates, that in the course

of three weeks anywhere from one up to four or five per cent. of the citric acid content might be affected" (R. 740).

This testimony indicates that if the material had been removed from the vessel within a week or two after she reached New York the loss would have been very small indeed.

Dr. Grunenberg, a graduate of Munich, who also studied at Zurich, Paris and Berlin, and who has his own laboratory in New York and is also associated with the Coblentz Laboratory, New York, testified that he had made a study of Citrate of Lime for many years; that it is highly insoluble; that he thought the only effect sea water would have on it would be contamination. He said first immersion in sea water would have little effect; fermentation would come with exposure to the air; the nourishment, the food for the bacteria, is found in the sea water; the subsequent immersions would have a very bad effect on the citric acid; they would help fermentation (R. 711). Each change of water, he says, would furnish new food for the bacteria. He also said that if the Citrate of Lime had been removed at Halifax and shipped to New York it could have been processed by well recognized methods either by fumigation or by centrifugation. His opinion was that 90% of the value of the Citrate of Lime could have been saved at Halifax (R. 712).

These experts were supported by Dr. Saarbruck, who had made experiments exposing citrate of lime to sea water. He found that the first immersion did little damage. Subsequent immersions and exposure to air caused rather rapid disintegration. After one week there was a

loss of 3% citric acid content; after two weeks 5% and after four weeks 7% (R. 753). After four weeks exposure to water the material showed moulds, real fermentation and formation of gases (R. 754).

(e) *The gross negligence of the ship in failing to care for the citrate of lime.*

(1) *At Halifax:*

The following important facts are not disputed anywhere in the record.

(I) Not an officer of the ship knew the nature, characteristics or value of Citrate of Lime.

(They knew there were 503 casks in the hold and the bill of lading provided that:

> "The value of package receipted for as above stated does not exceed the sum of One Hundred Dollars, unless otherwise stated herein" (Exhibit L-1, R. 1313).

Five Hundred and three casks at $100 each showed at least a value of $50,300).

Capt. Beeby thought Citrate of Lime would be damaged by being left in the hold under water for a length of time (R. 335).

The First Officer, Thirkell, thought Citrate of Lime spoiled immediately the water touched it. He said it was "just like slacked lime, ordinary lime or powder" (R. 376).

Surveyor Wilson was of the same opinion (R. 608).

This opinion was general at Halifax (R. 610).

Mr. Hensley, of Pickford & Black, admitted that he knew nothing about Citrate of Lime (R. 551).

On page 552 Hensley said:

> "My opinion was, no matter what the cargo was, it was best to get her to New York where they could handle it.
>
> Q. And what did you think of the condition of the cargo? A. Badly damaged" (R. 502).

Wilson, Surveyor for the London Salvage Association thought:

> "The best thing was to get her to New York *where there were dry docks and facilities for handling the cargo quickly*" (R. 601).

All of these gentlemen were called to survey the vessel by Pickford & Black, but absolutely no notification of any kind was given to either libellant, although the Master knew that the two libellants were the owners of the cargo, and no one even asked a pharmacist anything at all about Citrate of Lime.

It would seem that the first thought of any prudent master or ship owner or ship's representatives, under circumstances like this, would be to notify the owner of cargo and ask for help, or at least advice.

(H) The testimony makes it quite apparent that the master of the vessel did not tell the surveyors that the Citrate of Lime was in No. 1 Hold until he was about to leave port and be towed to New York.

Mr. Hall, Port Warden of Halifax, said that he knew from the cargo plans furnished by the Captain that No.

1 Hold was "supposed to be stowed full of cork" (R. 514):

> "Q. The cargo plan didn't give you that? A. It said No. 1 was full of cork."

Mr. Hull said:

> "I think we practically considered this citrate would be a total loss" (R. 516).

Claimant's Exhibit K (R. 1099), showing casks of Citrate of Lime in the bottom of No. 1 Hold, and cork on top of it, which was offered at page 365, was not the cargo plan that was used by the surveyors at Halifax. This is made clear by Mr. Hensley, the vessel's own agent at Halifax (R. 555).

He said:

> "Q. When the first survey was held you didn't know there was citrate in the bottom of the vessel? A. *Not on Monday; no particular attention was paid to it*" (R. 549).

The cargo plan they showed to Mr. Wilson when he made his survey (Exhibit Z, R. 1310) showed No. 1 Hold to have about 100 barrels of Lime Citrate on the bottom, had about half a hold full of bales of cork on top of that, sardines on top of the bales of cork, and embroideries, lemons, sardines, cork and dried fruit in No. 1 'tween decks. Wilson said he made Exhibit Z from the plan that was shown him (R. 573).

This indicates that there were two or more cargo plans used at Halifax, no one of which was correct.

Mr. Wilson, of London Salvage Association, on cross examination, said:

> "Q. You did not know at the time the vessel was in Halifax anything about the value of the citrate? At that time I am speaking of now? A. *No, we understood it was fairly valuable stuff*" (R. 609).

Wilson makes it clear "there was nobody there that represented this citrate of lime, no special representative" (R. 617).

(III) Every surveyor who was called into consultation at Halifax determined that the ship should be allowed to go forward to New York *to discharge cargo, drydock and make repairs.*

The Port Warden in his report said, taking into consideration the perishable nature of the cargo, and no dock being available, and after consultation with all parties interested,

> "I do certify that in my opinion the S. S. *Willdomino* of Halifax is in a fit and seaworthy condition to proceed to New York, *and on discharge of cargo to be drydocked for further examination and repairs*" (Exhibit X, R. 1296).

The report of Mr. Wilson for the London Salvage Association shows the following:

> "No. 1 hold (loaded bale cork).
>
> * * * * * * * *
>
> A joint conference was then held amongst representatives of the various interests, including

> Capt. Gilboy for owners, and following course jointly decided upon, *principally with view to save time*" (Exhibit Y, R. 1298-1301).

A telegram from Pickford & Black to the Williams Steamship Company, New York, shows that the day the vessel arrived in Halifax "surveyors suggest sealing hatches in number one hold and blowing the water out with compressed air which would enable her to proceed to New York" (Libellant's Exhibit 15, R. 1336).

Capt. Gilboy, Port Superintendent of the Williams Steamship Company, was sent from New York to Halifax to take care of the situation. He conferred with the surveyors and on July 28th telegraphed Williams Steamship Company, New York, as follows:

> "Ship at pier shifting cargo to afterholds also figure placing about six hundred tons sand on afterdeck to bring ship even keel. *This will take entire cargo and eliminate air proposition number one hold*" (R. 1337).

Had the water been blown out of No. 1 Hold in the manner first suggested by the surveyors, it is manifest that the cargo would have been kept as dry as possible until she reached New York Harbor where it could have been unloaded, and it would not have been taken out of the water when the ballast was put on the stern and reimmersed off New York when the ballast was thrown off. The action taken on Gilboy's insistence was the most harmful that could have been taken for the cargo.

That Gilboy controlled the situation is clearly indicated by the testimony:

> "Q. What was done here generally in connection with this ship was done under Captain Gilboy's orders and not yours? A. Yes, we all agreed on it; he was owners' representative here.
>
> Q. He came up specially for this case? A. Yes" (Hensley, R. 557).

Mr. Hensley, a Director of Pickford & Black, the ship's agents at Halifax and also agents for Lloyds at Halifax, testified that in the first instance he did not know there was anything but cork in the hold (R. 559).

This was probably the reason for the surveyors agreeing to put the ballast on the stern and raise the bow. The corkwood in the hold under water would not seriously bear the ship down by the head and, if anything, would have helped to buoy up the bow. The reports of the various surveyors made at Halifax all show that they all thought the hold contained nothing but cork.

When Hensley did learn there was Citrate of Lime in No. 1 Hold, he said:

> "I understood there was only 100 barrels, but I don't know if that is correct" (R. 561).

Mr. Hensley thought that the master was the one who told him that there was only corkwood in No. 1 (R. 561).

Mr. Hensley also said that he and the surveyors were of the opinion that the ship could be discharged as soon as she arrived at New York and then dry docked (R. 556).

Surveyor Moon of Lloyds Register of Shipping said:

> "It was a question that the ship be allowed to proceed to New York to discharge and be docked there and I allowed them to do that with certain recommendations as to shoring up bulkheads to make it safe" (R. 534).

(IV) At Halifax, had it not been for these representations of the master that No. 1 Hold was full of cork, it is quite apparent that over half of the cargo of Citrate of Lime would have been saved. It must be remembered that Capt. Beeby made no attempt to notify the consignees of the damage (R. 335), and that nobody at Halifax purported to represent the Citrate of Lime (R. 335).

All of the witnesses admit that the Citrate of Lime could have been unloaded at Halifax with divers (Capt. Beeby, R. 356; Brockwell, Second Officer, R. 393). It is unnecessary to quote all the others, but they all agree on this point.

The height of each cask was four feet (Capt. Beeby, R. 458). The casks were stored in four tiers with dunnage wood between each tier. Since each cask was four feet high and there were four tiers (R. 357, 358), with dunnage under each, the top of the upper tier was some twenty feet from the floor of the hold (Capt. Beeby, R. 339). The water in No. 1 Hold after the vessel struck was 19.6 forward (R. 338). After the ballast was placed on the stern of the vessel at Halifax the depth of water in the hold was 15 feet (R. 339).

The testimony indicates that the top tier of casks of Citrate of Lime was only partly submerged before the vessel reached Halifax, and when the ballast was

put on the stern the top tier of casks came entirely out of water and the third tier was partly out of water.

That this is the fact is not only deduced from the testimony of Capt. Beeby above mentioned, but is positively stated as a fact by Mr. Brockwell, the Second Officer. He says the casks when they came on board were in good condition; that they were large casks (R. 387). He saw the casks when the cargo in the 'tween docks was being removed at Halifax, and before the ballast was placed on the stern.

> "Q. Did you go into No. 1 Hold while you were taking this out (cargo from the 'tween decks)? A. Yes, I was down in No. 1 and you could see the water down in the center.
>
> Q. How far was the water up in the hold? A. The water was keeping its level, it was going down as the ship was coming up, it was well in the hold when I first saw it.
>
> Q. Did you see the casks? A. Saw some of the casks down between the sides of the cork.
>
> Q. The casks above the water or underneath the water? A. Underneath the water.
>
> Q. All of them? A. No, some of them had come up above the water, being as the tanks had been pumped out in the forward end so the casks had been wet.
>
> Q. Did you take out all the cork in No. 1 hold? A. No, all of it was not taken out because some of it was wet, it was jammed up.
>
> Q. Could you have discharged the casks at Halifax? A. Not without a diver" (R. 392).

Mr. Brockwell also saw the casks after the ship arrived in New York when they were discharging the rest of the cargo.

"Q. Were they then under the water or above? A. Some of them were under water" (R. 394).

On cross examination Mr. Brockwell said that when he saw the casks partly out of water at Halifax they had just started putting the ballast on. At that time he could look down between the bales of cork and could see certain of the casks.

"Q. When did you go down, was that while they were shifting cargo? A. That was after they had shifted a lot of it.

Q. It was during the shifting? A. During the shifting, they had not quite finished.

Q. Had they put the ballast on yet—this was before they put the ballast on? A. Just started putting the ballast on.

Q. At that time you could look down between the bales of cork and see the water? A. And see the water.

Q. Could see certain of the casks? A. They had all been wet because the cork above was wet as well.

Q. They were wet but out of water at that time? A. Out of water at that time.

Q. Did you estimate how much of the barrel was out of the water, or how many were out? A. I couldn't tell you.

Q. Did you see the entire barrel? A. No, just see the side of the barrel, some of the cork on top of the barrel, I could see down.

Q. But the water was below the cork and below the level of the top of the barrel? A. Below the level of the top of the barrel" (R. 399).

Since Citrate of Lime is highly insoluble and since the cork in No. 1 Hold could readily have been removed at Halifax, what excuse was there for not removing the top tier? They were placed in the hold with the ship's winches at Messina and there was no reason in the world for their not having been taken out with the same winches at Halifax if any reasonable effort whatsoever had been made to protect this cargo. The known depth of water in the hold and the known height of the casks as they were tiered in the hold, indicate that at no time were the tops of the casks wet, unless possibly by splashing. It cannot be successfully controverted that the top tier could have been removed with comparative ease at Halifax without a diver, and before any ballast was placed on the stern. The top tier constituted one-fourth of all the Citrate of Lime, and was worth $62,500. After the placing of four hundred tons of ballast on the stern of the vessel it is clear that the water in No. 1 Hold dropped from 19.6 feet to 15 feet, a drop of water in the hold of 4½ feet (Capt. Beeby, R. 338, 339). Thus it appears that had the top tier of casks been removed and placed on the after portion of the ship, the third tier from the bottom would then have been partly out of water and this tier could readily have been removed and placed on the deck out of water. The removal of the two top tiers of Citrate of Lime would have lightened the fore-portion of the ship, would have made the two bottom tiers accessible for easy and quick removal by divers and it is probable that not as much ballast would have been necessary as was actually placed on the stern.

There were 503 casks of Citrate of Lime in No. 1 Hold, each weighing about 700 lbs. when dry. There were 125 casks in each tier.

From these facts, which amount almost to a demonstration, we urge it was the duty of the ship at Halifax to have removed from the water at least half of this valuable cargo. To leave it in the hold under water and partly under water was gross negligence to such cargo under all of the circumstances. Since the officers of the ship and Capt. Gilboy, direct representative of the owners, elected not to notify the owners of the cargo or make any inquiries about it, but to assume all responsibility therefor themselves, without independent advice, they ought not now, after all the damage is done, be permitted to say that they did not know anything about Citrate of Lime and did not know whether or not it had dissolved like sugar.

(2) At New York:

Keeping in mind that the surveyors at Halifax, all upon the insistence of Capt. Gilboy, allowed the *Willdomino* to come to New York (first) to discharge cargo, (second) to go into drydock and (third) to make repairs, it is amazing that absolutely no attention was given the Citrate of Lime between August 7th, when the vessel reached New York, and October 2nd, when the letter offering delivery was mailed.

We respectfully urge that on this point the libellants may safely rest their claim upon the testimony of Mr. Williams, President of the Williams Steamship Company, agent of the *Willdomino*, Mr. Paul A. Dwyer, Port Manager of the Williams Steamship Company, and the failure of the claimant to call Capt. Gilboy as a witness.

The testimony of Mr. Williams and Mr. Dwyer, shows clearly that the owners gave no attention what-

soever to the cargo at any time after it was loaded into the *Willdomino,* and that their sole purpose was to operate the ship to New York as economically as possible, coal her at Sydney, an out of the way port where coal was very cheap, and make repairs with all speed, with the sole object of getting the vessel away again on another trip to Europe.

This is a strong statement but we believe that it is fully supported by the testimony.

Mr. Williams testified as follows:

> "Q. Taking into consideration all these things would you say that the work of discharging this cargo other than the citrate of lime which continued from August 9th to August 23rd, inclusive, was expeditiously done? A. Yes."
>
> * * * * * * * *
>
> "Q. Was there any reason why you should do it expeditiously? A. There was.
>
> Q. What was the reason? A. We had a very valuable vessel. We considered her worth so much money per day, and we were very anxious to make the discharge, to make the repairs and get her in service again" (R. 227).

"*Cross examination by Mr. Carpenter*:

> Q. How much did you figure she was worth a day? A. In those days you were able to get about a dollar a ton a day on your net registered demurrage and charter parties. In this case about $4,200 a day.
>
> Q. You figured her worth $4,200 a day to you? A. Yes" (R. 227).

Here then is the reason for the absolute disregard of the Citrate of Lime and its owners by the petitioner and all who represented the petitioner from the moment that the *Willdomino* struck the reef off Cape Canso.

Although the surveyors in Halifax permitted the ship to be rushed to New York to discharge cargo, it appears that no attention was given the Citrate of Lime after the vessel reached New York. The following extracts from the testimony of Mr. Williams show that he *talked* about it and nothing more.

Before the vessel reached New York he made no effort to find out what Citrate of Lime was (R. 67):

> "I don't think I perhaps knew there was any citrate of lime on board" (before the vessel reached New York; R. 67).
>
> *"I believe we discharged it as soon as the vessel was repaired and floated from the dry dock. That was my instructions"* (R. 65).
>
> *"We understood that it was important that we discharge it as soon as possible"* (R. 65).
>
> "I don't remember exactly about that" (Whether he was advised or not that Citrate of Lime was a very valuable commodity; R. 65).
>
> "Q. Did either of them advise you that the characteristics of the commodity were such that they were not badly damaged by first immersion in sea water, but the damage increased very rapidly with the additional time under water? A. I think there was some general talk along that line. I would not remember just who said it" (R. 66).
>
> "Q. Now, what efforts did you make between the 27th of July, when the vessel struck, and the

4th of October, when you tendered the cargo? A. I was more or less in touch with our Mr. Dwyer who had charge of that. We discussed it more or less. We discharged it as soon as we believed it was possible to do so.

Q. Well, I am asking you what you did in an effort to get it out. Did you do anything except discuss it? A. Well, I should say I left that more in charge of Mr. Dwyer. I know that he made every effort to discharge it as soon as possible" (R. 66).

"Q. After getting that report did you make any effort to find out the nature of the cargo in that hold, whether it was valuable or not, whether it was perishable or not? A. I don't think so. I didn't consider it necessary" (R. 68).

The whole cargo of lemons was dumped into the Ocean because condemned by the authorities in Jersey City (R. 68):

"It was naturally our endeavor to get her here as soon as possible to make repairs and discharge her, and get her in operation again. She cost us a large amount of money, and we were naturally interested in hurrying along. That is our business, yes, sir" (R. 68).

The above answer is quite consistent with the petitioner's conduct, which indicated an entire disregard of damaged cargo and an effort directed solely to making repairs and getting the boat into operation again.

"Q. Now, then, I want to know just what you did while this vessel was in New York in trying to get that cargo of Citrate of Lime out of her?

A. Well, as I say, I think we did it as soon as possible. We wanted to discharge it.

Q. That is your opinion. I want to know the acts, what you did, what efforts you made? A. Well, you will have to ask Mr. Dwyer, as I told you, I am not handling cargoes of our ships" (R. 69).

His organization talked over the possibility of not making any effort to remove the Citrate of Lime until the repairs had been completed to the vessel (R. 71). Their conduct shows that they decided on this course.

Mr. Dwyer, the Port Manager for the Williams Steamship Company, who was in charge of the loading and discharging of the vessels of that line, testified, in effect, that nothing was done to remove this cargo until after the repairs had been completed, two months after the vessel reached New York, except to talk about it. Here are some extracts from his testimony:

> The removal of this cargo "was considered and discussed between all of us, these experts that have been referred to, these surveyors that have been referred to, the stevedore, and the decision was reached that it was impossible and impracticable, would have been folly to attempt it with 19 feet of water in the hold of the vessel, covering this cargo" (R. 113).

On cross examination on this point he was asked:

> "Q. Now, you spoke about some conferences when it was decided that you would not unload the Citrate of Lime. Who were present at those conferences? A. Mr. Williams, the stevedore, as I recollect.

Q. The stevedore as you recollect, what was his name? A. Captain Howard.

Q. What was his first name? A. I don't know his first name.

Q. Who else, yourself? A. Myself and Capt. Gilboy, and then there were several surveyors, but I don't recollect their names, don't remember them at this time" (R. 128).

Apparently, this "discussion" was principally if not solely between the ship's owners and their own representatives.

Mr. Dwyer was only twenty-eight years of age (R. 114) and had slight experience for his position (R. 115). He had never had any experience with a damaged vessel or injured cargo (R. 116). This was his first experience of this kind.

Capt. Gilboy was sent to Halifax and handled the situation there as the owners' representative. He was an experienced mariner and it was Gilboy who met the vessel when she entered New York harbor from Halifax (R. 117).

Dwyer said:

"Q. How much of the time were you on board this vessel while she was being unloaded? A. I would visit her once a day or twice a day, • • • usually once in the morning and if possible again in the afternoon."

"Q. Are you the one who gave the orders as to what should be unloaded first • • • A. No, sir.

Q. Gilboy was the one? A. Wasn't any orders given that I know of as to what should be

unloaded first unless discharge the merchandise" (R. 119).

"Q. Did you ever in your life have to engage a stevedore or anybody else to unload cargo that was submerged? A. No, sir; I did not."

"Q. You never had such a situation yourself before? A. No, sir; I did not."

"Q. You did not know what to do? A. Yes, sir; we know what to do; we discussed what we would do" (R. 120).

"Q. Before he (Captain Gilboy) arrived did you make any effort to get a drydock on which to put the *Willdomino*? A. I had nothing to do with drydocking arrangements."

"Q. You had some responsibility because of the cargo, did you? A. Cargo; yes, sir.

Q. Well, knowing that part of the cargo was in the hold No. 1, that was damaged, full of water, what effort did you make to get a drydock to put the vessel? A. I don't know that I made any effort personally.

Q. Did you give directions to anybody to make arrangements for drydock? A. Personally, no."

"Q. Did you know of any one else that did? A. The usual arrangements were being made in our office" (R. 121).

"Q. I want to know what was done in this case. A. I don't recollect what was done in this case.

Q. I want to know what you did in trying to get the cargo out of No. 1 hold, if anything. A. We discussed the situation, as stated before, with the various surveyors and experts that were dealing with the job, and the conclusion reached was that it was impossible and impracticable to

take merchandise out of lower No. 1 hold until such time as the vessel had been repaired, which was done.

Q. Now, having arrived at that conclusion, what did you do? A. That is what we did, sir.

Q. You did nothing? A. That is what we did.

Q. You arrived at that conclusion? A. Yes" (R. 122).

"Q. Were you ever down in No. 1 hold before she was unloaded? A. Just at the time she started to unload.

Q. Were you ever in the hold while the vessel was at 129th Street? A. No, sir.

Q. Or while she was in Jersey City? A. No, sir" (R. 123).

"Q. Do you know how many casks were broken when you finally unloaded her? A. Offhand I could not say the exact number, no, sir."

"Q. Who was it that made the decision that you go ahead and unload the cork and the lemons and other cargo * * *, before you would unload the citrate of lime? A. I don't recollect who it was.

Q. Did you get your orders from Mr. Williams in that regard? A. I don't remember whether we did or not or whether I gave the orders to go ahead and discharge" (R. 124).

"Q. Well, in this particular case, I want to know if you are the man that gave the orders or if you got orders from somebody else? A. I don't recollect if I got the orders to discharge.

Q. You did not have authority to pass on matters like that? A. I had authority to start discharging the ship."

"Q. Did you make any inquiries from any-

body about the properties of citrate of lime? A. No, sir.

Q. Did you ask anybody about the value of citrate of lime? A. No, sir.

Q. That was the first notice—when was the first notice, if you know, that your company gave the Citro-Chemical Company that their citrate of lime had been damaged? A. I don't know, sir" (R. 125).

"Q. When was the first word that your company gave, if you know, to Pfizer & Company that their cargo was damaged? A. I don't know that either, sir.

Q. When was the first time that you knew that the citrate of lime had been damaged? A. I didn't know it. I knew that it had been covered by water."

"Q. I wish you would explain why it is, if you were in command for the Williams Steamship Company, of this situation regarding the damage to *Willdomino* and there was damaged citrate of lime in the hold, with water in it, why is it that you did not notify the libellants here that their cargo was damaged and try to find out something regarding its value and how it could be saved? A. I don't know that we were called upon under our bill of lading to do that. I did not realize that we were called on to notify them" (R. 126).

Dwyer testified at the trial that Capt. Gilboy was in Rotterdam in the employ of the Shipping Board (R. 117).

Gilboy did not testify in this case and his testimony was never taken.

We have therefore shown, out of the mouths of the owners of the ship, that absolutely no care was given

to the Citrate of Lime and no effort was made to remove it or save it.

The following witnesses testified that the cargo could have been removed at Halifax by the use of divers:

Wilson of the London Salvage Association:

> "I should not think it would be very difficult to get them out" (R. 592).

Thirkell, First Officer of the *Willdomino*:

> "It could have been discharged by divers, but it would have taken a long time, possibly three weeks, all depending on the nature of the cargo to be discharged" (R. 576).

Brockwell, the Second Officer:

> "The casks could have been discharged by the use of a diver" (R. 393).

All of the above were claimant's witnesses.

Mr. Howard, the claimant's own stevedore, who discharged all the cargo, on direct examination was asked:

> "Q. *Would you tackle such a job as that on stevedoring rates?* A. Well, I have got no equipment; *that is a diver's job*" (R. 142).

On page 144 Mr. Howard said that a diver could have worked on these casks, and that when he finally got them out in October the casks had burst, and that he got it out the best way he could.

When asked whether it would have been dangerous work for a diver, he replied:

> "Oh, I don't know that it would have been attended with a lot of danger for a diver, because

there wasn't a great amount of water; but as far as a stevedore is concerned it was impossible. I couldn't do anything with them" (R. 144).

On cross examination Mr. Howard admits he gave the Williams Steamship Company a rate for unloading the cargo in No. 1 hold.

"I gave them a rate for the whole cargo.

Q. Did you give them two rates for unloading that particular vessel that time, one for unloading the holds that contained the lemons and the casks of citronate, and still another rate for unloading the entire cargo? A. Yes, sir; there were various prices in the contract" (R. 145).

Mr. Hansen, a diver, called as a witness by the libellants, employed by the Baxter Wrecking Corporation of New York and a diver of thirty-three years' experience, said that he had removed all kinds of cargo under just such circumstances as in this case, including large casks under water.

"Q. Have you done that sort of thing before? A. Why, yes, sir; we have to do those things for to salvage the cargo and also for to stop up the vessel.

Q. Now, how would you get the casks out of the hold when they are under water? A. Why, casks, we generally use what we call barrel hooks, and if the cask is poor, then we have to use chain slings.

Q. And put the chain slings around the casks? A. Yes.

Q. And haul them out with a winch? A. Yes, sir" (R. 764).

Mr. Hansen said that the water in the hold wouldn't make much difference and that they could remove twenty-four or twenty-five casks in eight hours. One diver with equipment would have cost between $45 and $50 for an eight hour day; that divers frequently work in three eight hour shifts a day. In other words it would have been entirely possible to have removed the 503 casks of Citrate of Lime in seven working days of three shifts each at a cost of not in excess of $1,050 (R. 764, 765).

Mr. Jordan, a consulting engineer and marine surveyor, testified for libellants that he had personally discharged the whole of general cargoes from No. 1 holds, when flooded, and had the representative of every commodity in the cargo examine it as it came out of the hold; that the discharging from under water is done in different ways.

> "Sometimes we have employed divers, but usually we have made the bottom of the ship as tight as possible and pumped the hold out, which enables us to discharge that cargo with men in hip boots" (R. 774).

Mr. Jordan also said that:

> "If it was considered inadvisable to take it out while the vessel was in the water, it is a perfectly easy thing to take it out the first time she was in drydock, put it in the 'tween decks or on deck and then when she goes off the dock to get tenders, or whatever you want, to take it from the deck" (R. 775).

Mr. Jordan, on page 777, gave an almost exactly similar case of the Steamship *Cheltonian,* which ran on

the rocks in Newfoundland. She was put ashore with her nose on the shore, so as to prevent sinking, and the cargo was all discharged out of No. 1 in Sydney, Cape Breton, and the vessel then taken around to Halifax and put in drydock. In that case Mr. Jordan said:

> "The purpose of taking the cargo out was that it should not get any further damaged. We notified every consignee of that cargo, we had automobile tires, sausage skins, provisions, grain, all kinds of general cargo; all of the shippers of that cargo were notified, and they sent their representatives down to recondition that cargo on the spot so that no further damage should happen to it" (R. 777-778).

Mr. McNaught, a consulting engineer, who had been in the shipping business for forty-three years said:

> "The logical method would have been to have tested the inflow of water with pumps and if you could have overcome the influx of water by one or two pumps then you could have discharged her cargo, completing your suction lines down to the bottom of the hold as your cargo was recovered" (R. 785).

He also said that divers are frequently used to take cargoes out of a hold that is partly full of water, and cited an instance of a Barber line steamer where general cargo was taken out of No. 1 hold under water (R. 786).

Mr. McNaught, who had examined the specifications covering the damage to the *Willdomino*, said that his effort would have been to stop the holes in No. 1 hold.

> "The damage to No. 1 hold itself was not considerable, only extending to two floors in the for-

> ward end of the hold, and it is my impression that this could readily have been stopped and the No. 1 hold pumped out and the cargo recovered" (R. 787).

Mr. McNaught said that with the vessel afloat a diver would have plugged the holes with timbers at an expense of not exceeding $700, as an outside figure (R. 788). Mr. McNaught said that with the vessel on dry dock temporary repairs would have been made by just plugging the hole at an expense of not exceeding $250. Thirty-six hours would have been sufficient for plugging the hole (R. 788).

The testimony of Mr. Jordan that it was entirely practicable to have taken the cargo out of No. 1 hold and placed it on the deck while the vessel was in dry-dock, is not mere surmise. Mr. Thirkell, First Officer of the vessel, testified that as a matter of fact a number of barrels were taken out and placed on deck when the ship was on dry dock. He said they were never discharged, never taken out of the ship, just removed.

> "Q. How many barrels could have been taken out and placed on deck? A. I don't know, they would not allow you to place them all on deck" (R. 383).

And the Second Officer, Mr. Brockwell, said that the casks of citrate could have been put on the deck while the vessel was in dry dock (R. 402). Haffey saw some on deck in September (R. 676).

Why part of the casks were taken out of the vessel when she was in dry dock and again placed back in No. 1 hold and never unloaded prior to October 2nd, is a

mystery, but it is quite apparent that this is what was done. Capt. Gilboy could have explained this. From the failure of the claimant to produce Capt. Gilboy, we have the right to argue that he would have testified that he insisted to Mr. Williams that the Citrate of Lime be discharged by divers, or by the use of pumps or by plugging the hole, as libellants' witnesses testified has been done in many instances. Their failure to produce him or to take his testimony or to explain why his testimony was not taken, reflects most seriously on the claimant's case and leaves the natural inference that his testimony would have been harmful to the petitioner.

We respectfully urge that the testimony mentioned above demonstrates:

(1) That at least half of the Citrate of Lime in No. 1 hold could have been easily removed at Halifax; that the remaining half, if left in the hold until the vessel reached New York, could have been removed, either by the use of pumps or divers, at a gross expense of not over $1,000.

(2) That the vessel and her owners made no honest effort to protect or save this cargo. They gave it very little, if any, consideration.

(3) The Citrate of Lime, even when wet, had a very large salvage value, which it was the duty of the owners of the vessel to protect. Had any sort of care whatsoever been given the cargo, over 50% of its value would have been saved.

Every sound business instinct must condemn the failure of the vessel and her owners to protect this

shipment. Such conduct as this by the owners of a damaged vessel, towards damaged cargo, should not be encouraged, slighted or disregarded. Ship owners must have at least as high regard for cargo as they have for their own interest in getting their highly valuable vessels back again into trade to earn large freight money. Doubtless the owners of the ship figured that their liability was only $100 per package, $50,000 altogether, and they would make this amount of money in two weeks if they could only rush the ship back into service. This reasoning, however, does not relieve a ship owner from his duty to damaged cargo. As Mr. Justice Clifford said in the case of *The Niagara* (*supra*, p. 79):

> "It must not be understood that a master can abandon his ship and cargo upon any such grounds as are proved by the evidence in this case, or, indeed, upon any other, so far as the goods are concerned, when it is practicable for human exertions, skill and prudence, to save them from the impending peril."

POINT V.

The decrees of the Circuit Court of Appeals should be affirmed.

January 16th, 1926.

Respectfully submitted,

D. ROGER ENGLAR,
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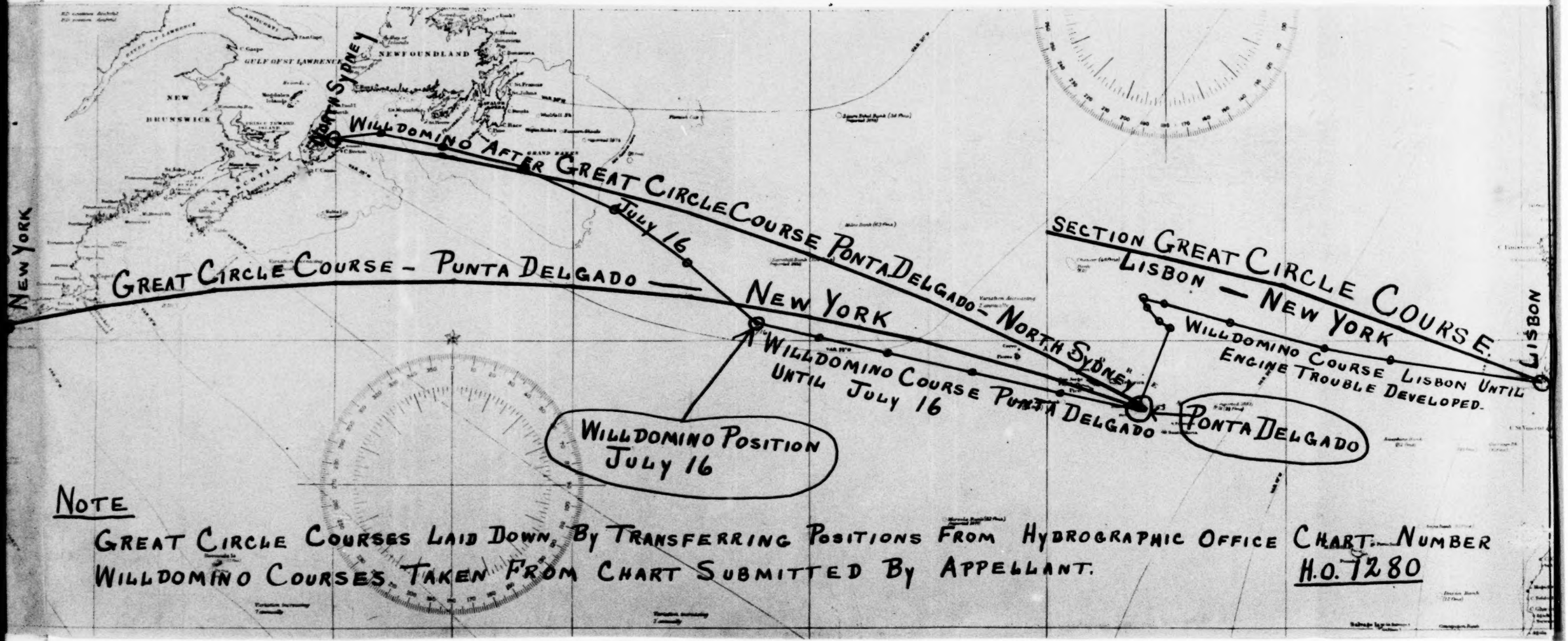
Counsel for Respondents.


NEW YORK
GREAT CIRCLE COURSE - PUNTA DELGADO
NEW YORK
WILLDOMINO AFTER GREAT CIRCLE COURSE PONTA DELGADO - NORTH SYDNEY
JULY 16
NORTH SYDNEY
WILLDOMINO COURSE PUNTA DELGADO UNTIL JULY 16
WILLDOMINO POSITION JULY 16
PONTA DELGADO
SECTION GREAT CIRCLE COURSE. LISBON — NEW YORK
WILLDOMINO COURSE LISBON UNTIL ENGINE TROUBLE DEVELOPED.
LISBON
NOTE
GREAT CIRCLE COURSES LAID DOWN, BY TRANSFERRING POSITIONS FROM HYDROGRAPHIC OFFICE CHART. NUMBER H.O. 1280
WILLDOMINO COURSES TAKEN FROM CHART SUBMITTED BY APPELLANT.